# Petition

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81-927

# In The
# Supreme Court Of The United States

NOVEMBER TERM, 1981

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NO.

**STATE OF CONNECTICUT,**
*Cross-Petitioner*

vs.

**LINDSAY B. JOHNSON,**
*Cross-Respondent*

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## CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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## A. Question Presented

In a state criminal case where error under *Sandstrom v. Montana*, 442 U.S. 510 (1979), was found despite general instructions that precisely and elaborately explained the nature of the inferences the jury could draw and the state's burden of proof in highly permissive language and specific instructions on the elements of each crime, should the error have been analyzed for harmlessness under *Chapman v. California*, 386 U.S. 18 (1967), and, if so, was the error harmless beyond a reasonable doubt in this case.

**B. Parties To The Proceedings**

The caption of this case in this Court contains the names of the parties to the proceedings.

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## D. Reference to the Official and Unofficial Reports

The opinion of the Connecticut Supreme Court has not yet been printed in the Connecticut Reports, but is officially reported in the Connecticut Law Journal, volume 43, no. 5, p. 5 (Aug. 4, 1981) and is printed in the appendix, p. 1A. No opinion was written by the Connecticut Supreme Court regarding the cross-petitioner's Motion to Reargue, but its summary order denying that motion is printed in the appendix. There was no written opinion of the trial court. An unofficial report of the proceedings is not yet available.

## E. Statement of the Grounds of Jurisdiction

1. The judgment of the Connecticut Supreme Court was released on August 4, 1981.

2. A timely motion to reargue was denied on September 16, 1981.

3. The cross-respondent has filed a petition for writ of certiorari docketed as No. 81-5560 on October 13, 1981.

4. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## F. Constitutional and Statutory Provisions

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Title 28 of the United States Code, §1257(3) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, . . .where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Section 53a-49(a) of the Connecticut General Statutes, entitled "Criminal attempt" provides:

> A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Section 53a-3 of the Connecticut General Statutes, entitled "Definitions" provides:

> (11) A person acts "intentionally" with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct;

Section 53a-54a of the Connecticut General Statutes, entitled "Murder defined" provides:

> A person is guilty of murder when, with intent to cause the death of another person, he

causes the death of such person or of a third person or causes a suicide by force, duress or deception.

Section 53a-134(a) of the Connecticut General Statutes, entitled "Robbery in the first degree" provides:

> A person is guilty of robbery in the first degree when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or . . .(3) uses or threatens the use of a dangerous instrument. . . .

## G. Statement of the Case

After a jury trial, the cross-respondent was found guilty on a four count criminal information charging him with attempted murder, kidnapping in the second degree, robbery in the first degree, and sexual assault in the first degree. Upon the cross-respondent's appeal to the Connecticut Supreme Court, error was found in the jury instructions pertinent to the attempted murder and robbery counts, those convictions were set aside and a new trial on those counts were ordered.

The Connecticut Supreme Court sustained the judgment on the sexual assault and kidnapping charges. The cross-respondent seeks review of the decision on the latter conviction in his petition for writ of certiorari filed with this Court on October 13, 1981.

This cross-petition seeks review of the decision reversing the judgments of conviction on the attempted murder and first degree robbery charges. The following facts are pertinent.

On December 20, 1975, the victim lost her way in Norwalk, Connecticut and sought help from the

occupants of another automobile. She accepted the offer of the cross-respondent, hereinafter referred to as the defendant, to ride with her in her car in order to point out the way. When they arrived at a route familiar to the victim, the defendant grabbed the victim around her neck and pulled her to the passenger side of the car. Another man from the second automobile got in and took control of the victim's car. The victim was told that the men needed a car. Later, the second car was abandoned by the defendant's companions who joined the men in the victim's car. A final stop was made to pick up a fifth man and the car was then driven to the New Haven, Connecticut area. When the defendant and the four others were arrested in Norwalk, Connecticut between 5:00 and 6:00 a.m. on December 21, 1975, they were in or near the victim's car.

After the victim was sexually assaulted, the defendant bound her hands with wire. She was driven to a secluded area near a bridge, where the defendant pulled her out of the car and forced her to run across the bridge. In the middle of the bridge, they struggled and the defendant threw the victim over the bridge. She landed on a large pipe, but jumped into the river and went under water when the defendant pursued her. The victim managed to evade the defendant by hiding under the bridge.

For the period between midnight and 4:30 a.m. on December 21, 1975, the United States National Weather Service in Bridgeport, Connecticut computed a wind-chill factor of ten degrees below zero. Approximately four inches of snow had accumulated from a snowfall that began on December 20, 1975.

The trial court gave extensive, unexcepted-to instructions to the jury that fill 57 pages of transcript. The Connecticut Supreme Court found that the general instructions "precisely and elaborately delineated the nature of the inferences the jury could draw and the state's burden on each element." (See Appendix p. 7A). However, it found that although these instructions were

"precise, elaborate and cast in highly permissive language" they were not sufficient to overcome the following language:

> The question of intent should cause you no great concern because intent is a question of fact that is solely within your province as jurors. However, you should be aware of a rule of law that will be helpful to you and that is that a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act.

Nonetheless, the Connecticut Supreme Court found that the specific instructions given on the kidnapping offense cured the error in the general instructions. It rejected the State's argument that the instructions delineating the elements of the other specific intent crimes, attempted murder and robbery, (See Appendix pp. 17A-20A) were rhetorically inconsistent with a conclusive presumption of intent. Further, it failed to address the issue of whether the error was harmless. Both issues were presented to the Connecticut Supreme Court by the State's brief, oral argument and Motion for Reargument.

## H. Reason for Granting The Writ

### THE QUESTION OF LAW HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In *Sandstrom v. Montana*, 442 U.S. 510, 526-27 (1979), this Court expressly left open the question whether a jury instruction found unconstitutional under its precepts can constitute harmless error under *Chapman v. California*, 386 U.S. 18 (1967). In refusing to even comment on whether the error it found in this case could or could not be established as harmless beyond a reasonable doubt, *but see State v. Truppi*, Conn. (42 Conn. L. J. No. 25, p. 1) (1980), *cert. denied*, U.S. , 101 S. Ct. 2024, 68 L. Ed. 2d 329 (1981), the Connecticut Supreme Court has, in effect, adopted an automatic reversal rule for what it deems *Sandstrom* error. This petition raises the question of whether an automatic reversal rule is warranted under circumstances where the state criminal defendant received a trial in accordance with the constitutional limitations as defined at the time, the evidence at trial was not tainted nor was its sufficiency challenged on appeal, the defendant's intent was not seriously disputed, and the jury instructions, unlike those given to David Sandstrom's jury, were very detailed, defined the offenses charged at length, and were prefaced by elaborate general instructions cast in highly permissive language, with the exception of the language found to violate *Sandstrom*. To answer this question, this Court must for the first time examine the relationships among several lines of cases: those that require the instruction to be assessed from the perspective of a reasonable juror, *e.g. Sandstrom v. Montana*, 442 U.S. at 514; *County Court of Ulster County v. Allen*, 442 U.S. 140, 157-59, n. 16 (1979); those that suggest that a jury charge cannot be viewed in isolation but must be evaluated as one component of the entire trial process to determine if a defendant's due process rights have been violated, *e.g., Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); and those that indicate that a harmless error analysis requires appellate review of the

entire trial record. *E.g., Parker v. Randolph*, 442 U.S. 62, 71 (1979); *Milton v. Wainwright*, 407 U.S. 371, 373 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969); *Chapman v. California*, 386 U.S. at 25-26.

*Chapman* and its progeny stand for the proposition that a rule of automatic reversal shall not apply to all constitutional errors. *Id.* at 22. *See generally* Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 Minn. L. Rev. 519, 524, 540 (1969). Once a state court deems a jury instruction constitutionally invalid under *Sandstrom*, it should determine as a matter of federal constitutional law whether the error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. at 24, 26. While *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947), and *Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946), have been taken as precedent for applying a rule of automatic reversal based on unconstitutional jury instructions, *e.g., State v. Truppi*, Conn. at , 42 Conn. L.J. No. 25 at p. 7, these cases have not been re-examined in a post-*Chapman* light. Since deciding *Chapman* this Court has not held that a constitutionally invalid jury instruction requires automatic reversal without examining the circumstances of the case in which the instruction was given.

*Sandstrom* error is particularly well suited for harmless error analysis that examines the offensive instruction in light of the entire charge and the evidence because there may be many instances where the issue of intent is not disputed, *e.g., Ross v. Israel*, 503 F. Supp. 131, 133 (E. D. Wis. 1980), or, as is in this case, turns solely on the credibility of the prosecution's only eyewitness to the events, the victim. *E.g., United States v. Reeves*, 594 F.2d 536, 537-38 (6th Cir. 1979). Stated another way, a reviewing court should find *Sandstrom* error harmless unless there is a reasonable possibility that the jury charge in context led to an erroneous factual determination when all of the evidence is examined.

In developing its constitutional harmless error rule, this Court stressed that constitutional errors must be evaluated "in the setting of a particular case" and recognized the need to "save the good in harmless error practices while avoiding the bad, so far as possible." *Chapman v. California*, 386 U.S. at 22-23. One salutary effect of a properly applied harmless error rule is the preservation of scarce judicial resources. An automatic reversal rule inevitably leads to unnecessary reversals and retrials of cases in which the result will be the same after the error has been corrected. If the conclusion is inescapable that the defendant committed the crimes for which the jury convicted him, it is less than clear that the interests of justice are served by forcing a retrial. A defendant's legitimate interests are not left unprotected by the application of a harmless error rule under those circumstances because the error did not mean the difference between conviction and acquittal.

The lack of guidance from this Court concerning the applicability of constitutional harmless error analysis to unconstitutional jury instructions has the potential to lead to unnecessary post-conviction litigation in both state and federal courts. Courts of last resort are taking dissimilar positions on the harmless error issue, but are gradually recognizing its applicability. *E.g., Baker v. Muncy*, 619 F.2d 327, 332 (4th Cir. 1980) (court suggested its willingness to consider harmless error issue if it had been raised); *Krzeminski v. Perini*, 614 F.2d 121, 125 (6th Cir.), *cert. denied*, 101 S. Ct. 199 (1980) (error found harmless under *Chapman* and *Harrington*); *Hosch v. State*, 246 Ga. 417, 271 S.E.2d 817, 820 (1980) (analysis applied and error found not harmless); *People v. Wright*, 408 Mich. 1, 289 N.W.2d 1 (1980) (error found harmless under *Chapman*); *State v. McKenzie*, Mont. ,608 P.2d 428, 458, *cert. denied*, 101 S.Ct. 626 (1980) (error found harmless under *Chapman*); *People v. Thomas*, 50 N.Y.2d 467, 407 N.E.2d 430, 429 N.Y.S.2d 584 (1980) (Fuchsberg, J., concurring) (harmless error analysis should be applied); *State v. Sheldon*, 301 N.W.2d 604, 613 (N.D. 1980) (analysis applied and error found not harmless). *Cf. Comm. v. Garcia*, Mass ,

399 N.E.2d 460, 472-73 (1980) (harmless error analysis applied to reasonable doubt instruction); *State v. Schulz*, Wis. , 307 N.W.2d 151, 158 (1981) (intoxication instruction not harmless and court felt that after *Sandstrom* there was "substantial question whether an unconstitutional instruction can ever be harmless.").

Consequently, while ordinarily a state court's harmless error analysis may not present a question worthy of full review by this Court, the cross-petitioner respectfully submits that the time is ripe for this Court to settle this issue and draw a brighter line to guide reviewing courts.

## CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Connecticut Supreme Court.

Respectfully submitted,

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# Appendix

# In The
# Supreme Court Of The United States

NOVEMBER TERM, 1981

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NO.

STATE OF CONNECTICUT,
*Cross-Petitioner*

vs.

LINDSAY B. JOHNSON,
*Cross-Respondent*

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## APPENDIX TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Opinion of the Supreme Court of Connecticut
as reported in 43 Connecticut Law Journal,
No. 5, pp. 5-10 (August 4, 1981)

## SUPREME COURT

June Term, 1981

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STATE OF CONNECTICUT *v.* LINDSAY B. JOHNSON

BOGDANSKI, C. J., SPEZIALE, PETERS, HEALEY and PARSKEY, Js.

Argued June 4—decision released August 4, 1981

Information in four counts charging the defendant with the crimes of attempted murder, kidnapping in the second degree, robbery in the first degree, and sexual assault in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Burns, J.*; verdict and judgment of guilty, and appeal by the defendant to this court. *Error in part; new trial.*

*Jerrold H. Barnett,* public defender, with whom, on the brief, was *Richard Emanuel,* assistant public defender, for the appellant (defendant).

*Linda K. Lager,* assistant state's attorney, with whom, on the brief, were *Arnold Markle,* state's attorney, and *John T. Redway,* assistant state's attorney, for the appellee (state).

SPEZIALE, J. After a jury trial the defendant was convicted on a four-count information of the crimes of attempted murder, in violation of General Statutes §§ 53a-54a, 53a-49, 53a-8; kidnapping in the second degree, in violation of General Statutes §§ 53a-94, 53a-8; robbery in the first degree, in violation of Public Acts 1975, No. 75-411 §§1 (a) (2), 1 (a) (3) (now General Statutes § 53a-134 (a) (2)

and (3) ); and sexual assault in the first degree, in violation of Public Acts 1975, No. 75-619 § 3 (a) (now General Statutes § 53a-70 (a) ) and General Statutes § 53a-8. The defendant appeals from the judgment rendered upon the verdict, claiming the trial court erred: (1) in its instructions to the jury on the element of intent, (2) in failing to instruct the jury that the abduction of the victim could be found to have been merely incidental to the commission of another crime, and (3) in denying the defendant his right to self-representation. None of these claims was raised at trial.

The jury could reasonably have found the following facts: On December 20, 1975, at approximately 10:30 p.m., the female victim dropped her boyfriend off at the Norwalk railroad station and started to return to her home in West Redding. Unfamiliar with Norwalk, and in cold and snowy weather, the victim lost her way. While still in Norwalk, she stopped her car and asked the occupants of another automobile for directions. The defendant, one of the four men in this automobile, offered to ride in her car to show her the way to route 7. When her car arrived at route 7, the defendant pulled the victim to the passenger side of the car and another man from the second automobile entered the victim's car and drove it away. The victim was told that the men needed a car. She was threatened, at various times, with bodily harm, was shown a knife and was told that there was a gun. Sometime later, while still in Norwalk, the second car was abandoned and its other two occupants entered the victim's car. At another stop, a fifth man was picked up. Eventually, the car was driven on the Connecticut Turnpike toward New Haven. Sometime in the early morning hours of December 21, 1975, the vehicle was stopped near an apartment building in the New Haven area. The victim was forced into the building where she was sexually assaulted by all five men. When the victim was

returned to her car her hands were bound with wire. The car was driven to a bridge on the New Haven-West Haven line where the defendant forced the victim to run across the bridge. At about the midway point, she and the defendant struggled and he threw her over the railing. Initially she landed on a pipe outside of the railing, but jumped into the river and went under the water when the defendant pursued her. She managed to elude him by hiding under the bridge. Sometime later she made her way to a nearby residence from which the police were called. The defendant and others were arrested in Norwalk between 5 and 6 a.m. the same morning in or near the victim's car.

## I

### Intent Instructions

The defendant, relying on *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), claims that the trial court's instructions to the jury on the element of intent, which included the statement that "every person is conclusively presumed to intend the natural and necessary consequences of his act," violated his constitutional rights. On a number of recent occasions this court has considered jury instructions alleged to violate the rule of *Sandstrom*. *State* v. *Stankowski*, Conn. (42 Conn. L.J., No. 46, pp. 5, 14–15) (1981); *State* v. *Brokaw*, Conn. (42 Conn. L.J., No. 31, pp. 9, 11) (1981); *State* v. *Truppi*, Conn. (42 Conn. L.J., No. 25, pp. 1, 2–6) (1980), cert. denied, U.S. , 101 S. Ct. 2024, 68 L. Ed. 2d 329 (1981); *State* v. *Nemeth*, Conn. (42 Conn. L.J., No. 23, pp. 3, 6) (1980); *State* v. *Theriault*, Conn. (42 Conn. L.J., No. 22, pp. 8, 11–13) (1980); *State* v. *Vasquez*, Conn. (42 Conn. L.J., No. 8, pp. 36, 37–40) (1980); *State* v. *Maselli*, Conn. (42 Conn. L.J., No. 7, pp. 15, 18–19) (1980), cert. denied, U.S. , 101 S. Ct. 868, 66 L. Ed. 2d 807 (1981); *State* v. *Perez*, Conn. (41 Conn. L.J., No. 52, pp. 12, 16–17) (1980); *State* v. *Ruth*, Conn. (41 Conn.

L.J., No. 50, pp. 14, 18) (1980); *State* v. *Arroyo*, 180 Conn. 171, 173–82, 429 A.2d 457 (1980); *State* v. *Harrison*, 178 Conn. 689, 693–99, 425 A.2d 111 (1979). This case, however, involves jury instruction language not previously considered by this court.

In the ordinary case we would refuse to review error claimed in jury instructions which, as here, was not brought to the attention of the trial court. Practice Book §§ 315, 3063. We have, however, previously held that because the type of error claimed falls within the "exceptional circumstances" rule of *State* v. *Evans*, 165 Conn. 61, 69–70, 327 A.2d 576 (1973), we will review it despite the lack of objection and exception below. *State* v. *Vasquez*, supra, 37; *State* v. *Maselli*, supra, 18; *State* v. *Perez*, supra, 16; *State* v. *Arroyo*, supra, 173–74.

In *Sandstrom* v. *Montana*, supra, the United States Supreme Court held that a jury instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" violated the defendant's due process rights because a reasonable jury could have interpreted the instruction as a burden-shifting presumption like that invalidated in *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), or as a conclusive presumption like those invalidated in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978) and *Morissette* v. *United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952). *Sandstrom*, supra, 517–24. The rule of *Sandstrom*, however, must not be oversimplified. *State* v. *Arroyo*, supra, 175. *Sandstrom* does not invalidate, for example, the use of an "entirely permissive inference or presumption, which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant." *Ulster County Court* v. *Allen*, 442 U.S. 140, 157, 99 S. Ct.

2213, 60 L. Ed. 2d 777 (1979); *State* v. *Arroyo*, supra. The use of the word "presume" by itself does not render an instruction invalid under *Sandstrom*. *State* v. *Arroyo*, supra. Rather, it is the "lack of qualifying instructions as to the legal effect of the presumption," making it possible for a reasonable jury to interpret the presumption as conclusive or burden-shifting, which renders the instruction unconstitutional. *Sandstrom*, supra, 517. In a number of cases this court has found no error in instructions containing language similar to that invalidated in *Sandstrom* because the challenged instructions contained other language not present in the *Sandstrom* instructions which was sufficiently precise or elaborate so that the jury would not have applied the instructions in an unconstitutional manner. *State* v. *Stankowski*, supra, 15; *State* v. *Truppi*, supra, 5–6; *State* v. *Nemeth*, supra, 6; *State* v. *Vasquez*, supra, 38–40; *State* v. *Maselli*, supra, 18–19; *State* v. *Perez*, supra, 17; *State* v. *Arroyo*, supra, 179–80.

In examining a jury instruction to determine how a reasonable jury could have interpreted it; *Sandstrom*, supra, 514; we look at the charge as a whole, and will not sever one portion and analyze it in isolation from the rest. *State* v. *Truppi*, supra, 4; *State* v. *Vasquez*, supra, 37; *State* v. *Harrison*, supra, 693. Although general instructions on the state's burden of proof and the defendant's presumed innocence do not by themselves cure an otherwise invalid instruction; *Sandstrom*, supra, 518–19 n.7; *State* v. *Harrison*, supra, 697; general instructions may be considered together with other instructions in determining whether the jury could have interpreted the charge in an impermissible manner. *State* v. *Vasquez*, supra, 39. In evaluating a jury charge to determine whether a *Sandstrom* error has been corrected, the proper consideration is whether the charge, taken as a whole, "clearly delineates the state's burden of proof on every element, including intent" so that "the potential for

confusing the jury is sufficiently reduced." *State* v. *Harrison*, supra, 697.

Prior to instructing the jury regarding the elements of the four crimes with which the defendant was charged and the specific criminal intent required for attempted murder, kidnapping in the second degree, and robbery in the first degree, the trial court provided the jury with a number of general instructions, including a general instruction on intent. It described these instructions as "general comments and principles which form a necessary part of every charge." The jury were told that it was the trial court's duty to state the rules of law applicable to the case and that such statements of law were binding on them. They were also instructed that it was the jury's duty to find the facts and that they were "the sole judges of what the facts are." The jury were instructed on the defendant's presumed innocence, the state's obligation to prove every element of the crimes charged and the state's burden of proving those elements beyond a reasonable doubt. The general instructions contained an explanation of circumstantial evidence and how the jury could draw "reasonable and fair conclusions or inferences" from such evidence. Previously the jury had been told that the evidence that they were to consider included not only the testimony heard and exhibits offered but "any reasonable inferences which you may draw therefrom. You may draw reasonable inferences from the established facts in the case. The inference which you draw, however, must not be from a guess upon the evidence or a surmise upon the evidence, but it must be from a fact which the evidence has established. Inferences that you may draw from these established facts must be logical and reasonable and well-founded upon facts which have been proven in the trial of this case."

In its general instructions, the trial court described intent as "[o]ne of the elements common

to each of the four charges in the information" and promised to "discuss this in more detail as I explain the elements of each offense to you." It went on to state: "The question of intent should cause you no great concern because intent is a question of fact that is solely within your province as jurors. However, you should be aware of a rule of law that will be helpful to you and that is that a person's intention may be inferred from his conduct and every person is *conclusively presumed* to intend the natural and necessary consequences of his act." (Emphasis added.)

The initial question for this court is whether the general instructions, taken as a whole, were erroneous under *Sandstrom*. If the challenged instructions violate the rule of *Sandstrom*, they must do so solely because of the occurrence of the word "conclusively." Had these instructions been cast in terms of a mere presumption rather than a conclusive presumption, the apparent *Sandstrom* violation would have been cured by the remainder of the general instructions. Those other instructions precisely and elaborately delineated the nature of the inferences the jury could draw and the state's burden on each element. They, therefore, would have prevented the jury from interpreting the presumption in an unconstitutional manner. *State* v. *Stankowski*, supra, 15; *State* v. *Truppi*, supra, 5–6; *State* v. *Nemeth*, supra, 6; *State* v. *Vasquez*, supra, 38–40; *State* v. *Maselli*, supra, 18–19; *State* v. *Perez*, supra, 17; *State* v. *Arroyo*, supra, 179–80.

The challenged instruction was cast expressly as a conclusive presumption. While the use of the word "presume" by itself is ambiguous as to whether the presumption is permissive, mandatory, burden-shifting, or conclusive, there can be no serious question as to how the challenged instruction could have been interpreted. Thus, even though the trial court's general instructions, taken as a whole, were precise, elaborate and cast in highly permis-

sive language, it cannot be said those instructions were sufficient to prevent the jury from interpreting the presumption in the way it was expressed to them. The general instructions, therefore, were invalid under *Sandstrom* because they contained an express conclusive presumption. The unconstitutional effect of such a presumption, unless elsewhere cured, would be to deny the defendant a fair trial by requiring or directing the jury to find against the defendant on the element of intent, thus invading the fact-finding function of the jury. *Sandstrom*, supra, 521–23; *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 435, 446, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978).

The conclusion that the trial court's general instructions were erroneous under the rule of *Sandstrom* does not, however, dispose of the defendant's claim of error because it is still necessary to consider the impact of the erroneous general instructions on the specific instructions given on each count. Although the general instructions would normally be incorporated, where applicable, in the court's specific instructions, the actual instructions on each count must be examined to determine whether the *Sandstrom* error in the general instructions was repeated, incorporated, or possibly cured by the specific language used. *State* v. *Truppi*, supra.

A

First Count—Attempted Murder

In its specific instruction on the crime of attempted murder, the trial court properly told the jury that one of the elements of the crime that the state had to prove beyond a reasonable doubt was that the defendant had "the specific intent to commit murder." The jury was told that in considering the question of the defendant's intent "no one can look into a man's mind and see what his intention is. The only way to decide that question is to infer

from the accused's conduct in the light of the surrounding circumstances." At this point, the trial court repeated its erroneous instruction "as previously stated," that "every person is *conclusively presumed* to intend the natural and necessary consequences of his act." (Emphasis added.) While the trial court later somewhat undercut its conclusive language by telling the jury "[i]f you believe [the victim's] version as to the defendant's conduct at the bridge, you *may presume* he intended what would be the natural and necessary consequences of his actions," this language cannot overcome the express conclusive presumption repeated in the instructions on this count. (Emphasis added.) Because the instructions on the first count contained the express language previously found offensive under *Sandstrom*, the defendant's conviction on this count must be reversed.

B

SECOND COUNT—KIDNAPPING

In its specific instruction on the crime of kidnapping in the second degree, the trial court properly explained the element of intent applicable to that crime and told the jury that "a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct." At this point the trial court stated that "I have already instructed you that what a man's intention has been is necessarily very largely a matter of *inference*. Again, no witness can be expected to come here and testify that he looked into another man's mind and saw therein a certain intention. The *only way* in which you can determine in a case such as this what a man's intention was at any given time is by determining what his conduct was and what the circumstances were surrounding that conduct and from those *infer* what his intention was.

"As stated before, to draw such an inference is not only the privilege but also the duty of a juror *provided*, of course, *the inference to draw is a reasonable inference.*" (Emphasis added.)

The trial court's instruction on the second count neither used the offending language of the general instruction nor expressly incorporated it. In fact, these specific instructions were cast solely in properly permissive language. In the absence of the phrase "conclusively presumed," the highly permissive language of this instruction, expressed in terms of inference rather than presumption, had a significant curative effect. *State* v. *Vasquez*, supra, 38; *State* v. *Arroyo*, supra, 178–80. The *Sandstrom* error of the court's general instruction was cured by the specific instruction given by the court. In considering the defendant's guilt on the second count the jury would have applied the permissive inferences described to them in the specific instructions on that count rather than the improper presumption described in general terms earlier. Therefore, there was no error in the trial court's instructions on this count.

C

THIRD COUNT—ROBBERY

In its specific instructions on the crime of robbery in the first degree the trial court properly explained the element of intent applicable to that crime but offered no explanation to the jury on how to ascertain this intent. It did not repeat the offending language of the general instruction or expressly incorporate it. Such repetition or express incorporation would have rendered the specific instructions invalid as indicated in our discussion of the instruction on intent to commit attempted murder. The intent instruction on the third count, robbery, is similar in one respect to the one given on the second count, kidnapping, which we upheld: neither

one repeated or expressly incorporated the erroneous instructions. The general instructions in the two counts differ in that the kidnapping instruction contained highly permissive and ultimately curative language but the robbery instruction contained no such language. In the absence of such additional instructions on the third count, the question for us to decide is whether the robbery instructions implicitly incorporated the erroneous general instructions or retained the curative effect of the intent language contained in the immediately preceding instructions on the second count, kidnapping.

As a practical matter, the curative effect of the preceding instructions would probably be more important in the jury's consideration than the earlier erroneous instruction; however, we cannot assume this to be the case. In *State* v. *Arroyo*, supra, 177–80, for example, this court approved the trial court's instruction on the first count, even though cast in terms of a presumption of intent from consequences, because of additional curative language, but held invalid the same language in instructions on a lesser included offense because of the absence of the additional language. We concluded that "it cannot be assumed that the court's instructions on intent as an element of murder would have been applied to such an extent that the jury unquestionably would have considered them in conjunction with the court's instructions on intent as an element of manslaughter." Id., 181. Similarly, in *State* v. *Truppi*, supra, 5–6, this court upheld one of three counts affected by an erroneous general instruction because of additional curative language in the instructions on that count, but would not assume that this curative language was considered on the other counts where it did not appear. Therefore, because we cannot assume the curative language of the instructions on the second count carried over to the instructions on the third,

we must assume the taint of the erroneous general instructions remained. Because it is reasonably possible that the jury based its conclusion on intent to commit robbery on the erroneous general instructions, the conviction on this count must be reversed.

## D

### Fourth Count—Sexual Assault

The impact of the erroneous general instruction on the defendant's conviction on the charge of sexual assault in the first degree must be analyzed in a much different way than its impact on the first three counts. While each of those counts involved specific intent crimes, sexual assault in the first degree is a general intent crime with no element of specific intent. *State* v. *Truppi*, supra, 3, 3 n.4. The trial court's instruction on this count, therefore, did not mention intent as an element and did not incorporate the erroneous general instructions.[1] Thus, there is no *Sandstrom* error in the conviction on this count. Id.; *State* v. *Perez*, supra, 17.[2]

## II

### "Incidental" Kidnapping Instruction

The defendant also claims error in the trial court's failure to instruct the jury on the second count that they could find that the victim's abduction was merely incidental to the commission of another crime and, thus, would not support a conviction of kidnapping in the second degree. The defendant did not request that the trial court give the instruction he now claims was reversible error not to give. Nor did the defendant enter an objection and exception to the instructions given on the ground raised here. This court will not review alleged errors in jury instructions where, as here, no exception was taken in the trial court; Practice Book §§ 315, 3063; *State* v. *Malley*, 167 Conn. 379,

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1 See footnotes, page 15A.

383, 355 A.2d 292 (1974); unless such error is "plain error" which we should consider under § 3063 of the Practice Book or falls within the "exceptional circumstances" rule of *State* v. *Evans*, 165 Conn. 61, 69–70, 327 A.2d 576 (1973). Because of the express language of the kidnapping statute, General Statutes § 53a-94, this court has consistently rejected all attempts to adopt the merger doctrine of *People* v. *Levy*, 15 N.Y.2d 159, 204 N.E.2d 842, cert. denied, 381 U.S. 938, 85 S. Ct. 1770, 14 L. Ed. 2d 701 (1965). *State* v. *Briggs*, 179 Conn. 328, 338–39, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980); *State* v. *Lee*, 177 Conn. 335, 342–44, 417 A.2d 354 (1979); *State* v. *Chetcuti*, 173 Conn. 165, 170, 377 A.2d 263 (1977); *State* v. *Dubina*, 164 Conn. 95, 99–100, 318 A.2d 95 (1972). In Connecticut a defendant may be convicted of second degree kidnapping as well as other felonies arising out of the same incident "as long as the state was able to prove, beyond a reasonable doubt, all of the essential elements of each crime." *State* v. *Briggs*, supra.

Thus the charge which the defendant claims the trial court erred in failing to give is not even an accurate statement of Connecticut law. *State* v. *Chetcuti*, supra, 170–71. The defendant has failed to demonstrate that because the trial court failed to instruct the jury on this issue, he was deprived of a "fundamental constitutional right and a fair trial." *State* v. *Evans*, supra, 70. The error claimed by the defendant is neither plain error nor does it fall within the *Evans* rule. It is, therefore, not reviewable by this court.

## III

### Denial of Right to Self-Representation

Finally, the defendant claims that he was erroneously denied his constitutional right to represent himself as guaranteed by *Faretta* v. *California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)

and the constitution of Connecticut, article first, § 8. This claim arises out of a series of incidents in which the defendant expressed dissatisfaction with his court-appointed counsel. The defendant's expressions became so disruptive that during the trial he had to be removed from the courtroom. At a later point the defendant returned to the courtroom and expressly asked to be allowed to represent himself so that he could call Judge Jon O. Newman to testify about his then-recent decision in *United States* v. *Robinson*, 421 F. Sup. 467 (D. Conn. 1976), rev'd, sub nom. *United States* v. *Newman*, 549 F.2d 240 (2d Cir. 1977) relating to the prosecutorial use of preemptive challenges to jurors on racial grounds. The trial judge in granting the defendant's request to represent himself put his trial counsel on standby status. Practice Book § 961. The defendant was advised, however, that because the prosecution was still presenting its case, no defense witnesses would be called at that time. During this colloquy there was some discussion indicating that the defendant, acting pro se, could not himself subpoena Judge Newman, but the judge left the possibility of calling Judge Newman open if the defendant could express sufficient reason to call him. At this point the defendant became disruptive again and had to be removed from the courtroom. He did not return for the rest of the trial.

Our review of the record reveals that the defendant was not deprived of his right to self-representation by the actions of the trial court. In fact, the trial court scrupulously protected those rights. Indeed, it was the defendant himself, through his disruptive behavior, who forfeited his right to self-representation. Practice Book §§ 892, 965; see *Faretta* v. *California*, supra, 834 n.46.

There is error in part. There is no error and the judgment is affirmed as to the second and fourth counts charging kidnapping in the second degree and sexual assault in the first degree. There is

error as to the first and third counts charging attempted murder and robbery in the first degree; and as to those counts only, the judgment is set aside and a new trial is ordered.

In this opinion the other judges concurred.

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## FOOTNOTES

1 The defendant maintains that because the general instructions included the statement that intent was "[o]ne of the elements common to each of the four charges," the erroneous instruction did impact on the fourth count and distinguishes this case from *State v. Truppi*, supra; however, this brief and isolated reference by the trial court cannot add an element of specific intent to the crime of sexual assault in the first degree. The trial court may have misspoke or it may have been indicating that one of the lesser included offenses on this count included a form of specific intent as an element. The trial court may also have been referring to the general criminal intent required for virtually all crimes. In any event, its general reference to intent as an element of the fourth charge did not make it so. Id.; see *State v. Perez*, supra, 17.

2 The defendant argues that one of the lesser included offenses on the fourth count, sexual assault in the third degree, includes the element of sexual gratification, a specific criminal intent, which, therefore, incorporated the erroneous general instructions within the specific instructions on the fourth count. We do not need to consider this claim, however, because the trial court's instructions made clear that the jury was not to consider lesser included offenses until they had found the defendant not guilty of the greater offense. Because the defendant was found guilty of the original offense charged, the lesser included offense was not even considered by the jury. A *Sandstrom* error in an instruction not considered by the jury is harmless. *State v. Ruth*, supra, 18.

NO. 8466

STATE OF CONNECTICUT : SUPREME COURT

VS. : STATE OF CONNECTICUT

LINDSAY JOHNSON : SEPTEMBER 16, 1981

**ORDER**

The State's Motion for Reargument and the Defendant's Motion for Reargument having been presented to the court, they are hereby ordered denied.

By The Court

/s/ Donald H. Dowling
Chief Clerk

Notice
Arnold Markle, State's Attorney
Ernest J. Diette, Jr., Assistant State's Attorney
Linda K. Lager, Assistant State's Attorney
Jerrold H. Barnett, Public Defender
Clerk, Superior Court, New Haven
September 17, 1981

Received September 21, 1981
State's Attorney
Judicial District of New Haven

**Excerpt from Trial Court's Charge on Attempted Murder**

"The first element then which the State must prove beyond a reasonable doubt to sustain a conviction of the accused on this charge is that he has the specific intent to commit murder. And this requires that the crime of murder be explained to you.

"A person commits a murder when, with intent to cause the death of another person, he causes the death of such person. Therefore, on this phase of the case, the first question you must ask is this:

What intention did the Defendant have in mind? Did he alone or participating with others intend to commit the crime of murder? Did he alone or participating with others intend to cause the death of Jane Gehrett?

"Now, no one can look into a man's mind and see what his intention is. The only way to decide that question is to infer from the accused's conduct in the light of the surrounding circumstances. But as previously stated, every person is conclusively presumed to intend the natural and necessary consequences of his act.

"The State has offered evidence concerning a Defendant's conduct towards Miss Gehrett at the bridge and suggests that by his actions he intended to murder her. Of course, you as jurors may believe or disbelieve all or any part of Miss Gehrett's testimony in this regard as you deem proper. If you believe her version as to the Defendant's conduct at the bridge, you may presume he intended what would be the natural and necessary consequences of his actions, under the prevailing circumstances and conditions; for example, the temperature of air and water and the force used against her person.

"If, upon all the evidence, you conclude beyond a reasonable doubt that the Defendant had formed in his mind the intention to cause the death of Miss Gehrett,

your next question is whether he intentionally did or omitted to do anything which, under the circumstances, as he believed them to be, was an act or omission constituting a substantial step in a course of conduct planned to culminate in her death. And a person acts intentionally with respect to a result or to conduct when his conscious objective is to cause such result or to engage in such conduct.

"You have heard the evidence concerning the Defendant's conduct on the night in question. It is for you to determine on the evidence whether the State has proved beyond a reasonable doubt first that Mr. Johnson intended to cause the death of Jane Gehrett, and second was that with that intent he intentionally did anything which, under the circumstances as he believed them to be, was an act constituting a substantial step in a course of conduct planned to culminate in her death.

"If you find that the State has proved each of these elements beyond a reasonable doubt, you must find the Defendant guilty of criminal attempt to commit murder. If you do not find the State has proved each of these elements beyond a reasonable doubt, then you must find him not guilty on this first count."

**Excerpt from Trial Court's Charge on Robbery**

"Under our Penal Code, a person steals property and commits larceny when, with the intent to deprive another of money or other property or to appropriate the same to himself or a third person, he wrongfully takes, obtains, or withholds such money or other property from an owner.

"The State must prove that the property was taken by the Defendant with the specific intention of depriving the owner or some other person of it or of appropriating it to himself or to some third person.

"To intend to deprive another of property means intending to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him or intending to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.

"To intend to appropriate property to ones self or a third person means intending to exercise control over it or to aid a third person to exercise control over it, permanently or for extended a period or under such circumstances as to acquire the major portion of its economic value or benefit or intending to dispose of the property for the benefit of the third person.

"The property must have been taken by the Defendant for the purpose of keeping or using it permanently or virtually so or of disposing of it in such a way as to result in a permanent or virtually permanent loss of the property to the owner. For example, it would not be larceny to borrow a car for a joy ride, intending to return it or leave it with the owner who will probably recover it after a relatively short time. On the other hand, the fact that a thief took possession of the property for only a short time would not necessarily mean that he did not intend to keep it or deprive the owner of it permanently.

"He may have been apprehended soon after the theft or may have had no opportunity to fulfill his original intention. Since this wrongful or felonious intention of depriving a person or property or appropriating the property to onesself or a third person must be proved, it would not constitute larceny where someone took property under the honest impression, however mistaken, that he had a right to do so, or where he took some property that he honestly believed had been abandoned or where he took property intending to return it to the true owner, or where he honestly believed he had permission to take the property.

"It is only where the taker has wrongful or dishonest intention, as I have defined it for you, that the crime of larceny would have occurred. It is essential, therefore, that the State prove beyond a reasonable doubt that the Defendant had this unlawful purpose or intention in his mind at the time he took the property.

"In addition to this mental element of the crime, the State must also prove that the Defendant wrongfully took, obtained, or withheld the property from the owner. Larceny includes any wrongful taking of property away from the possession or control of the person who is entitled to it, whether by stealth, force or other unlawful means. It also constitutes larceny to withhold property from an owner wrongfully.

"The word wrongfully means that the taking, obtaining or withholding, which is the subject of the larceny, must have been without any legal justification or excuse. And the acts of wrongfully taking, obtaining or withholding must be accompanied by the unlawful purpose or intention of depriving another person of the property or of appropriating it to oneself or a third person.

"Then the State must prove not only that the Defendant committed acts which constituted a wrongful taking, obtaining or withholding of property, but also that he so acted with the wrongful intention we have just discussed. And it is also essential for the crime of larceny that the property involved be taken from an owner."

# Joint Appendix

Supreme Court, U.S.
FILED
APR 12 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-927

# In The Supreme Court Of The United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT,
*Petitioner*

v.

LINDSAY B. JOHNSON,
*Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 16, 1981

CERTIORARI GRANTED FEBRUARY 22, 1982

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## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES AND FILING DATES

January 9, 1976 — Filing of four-count information of Arnold Markle, State's Attorney for the County of New Haven, accusing Lindsay B. Johnson of Criminal Attempt to Commit Murder, Kidnapping in the Second Degree, Robbery in the First Degree, and Sexual Assault in the First Degree.

March 4, 1976 — Filing of State's Bill of Particulars.

November 2, 1976 — Jury returned verdict of guilty to all counts of the information.

November 24, 1976 — Sentenced imposed by Burns, J.

December 1, 1976 — Defendant's appeal to the Connecticut Supreme Court filed.

February 5, 1981 — Defendant's amended preliminary statement of issues filed.

June 4, 1981 — Appeal argued before the Connecticut Supreme Court.

August 4, 1981 — Decision issued by the Connecticut Supreme Court.

August 10, 1981 — State's motion for reargument filed.

September 16, 1981 — Order of Connecticut Supreme Court denying state's and defendant's motions for reargument.

NO. 20875

STATE OF CONNECTICUT : SUPERIOR COURT

VS. : NEW HAVEN COUNTY

LINDSAY B. JOHNSON : STATE OF CT

**INFORMATION**

IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT New Haven County, January Term, 1976, Arnold Markle, State's Attorney for the County of New Haven accuses Lindsay B. Johnson of Criminal Attempt to commit Murder and charges that at the Town or Cities of New Haven and West Haven on or about the 21st day of December, 1975, the said Lindsay B. Johnson, William E. Martin, Clinton Martin, Charles E. Spencer and Carlton Bailey, with intent to cause the death of another person, namely, Jane Gehrett, did attempt to cause the death of such person, in violation of Sections 53a-54(a), 53a-49 and 53a-8 of the General Statutes.

**2nd Count**

And the Attorney aforesaid further accuses Lindsay B. Johnson of Kidnapping in the Second Degree and charges that at the Towns or Cities of Norwalk, Westport, Fairfield, Bridgeport, Stratford, Milford, Orange, West Haven and New Haven, on or about December 20, 1975 and December 21, 1975, the said Lindsay B. Johnson, William E. Martin, Clinton Martin, Charles E. Spencer and Carlton Bailey, did abduct another person, namely, Jane Gehrett, in violation of Section 53a-94 and 53a-8 of the General Statutes.

**3rd Count**

And the Attorney aforesaid further accused Lindsay B. Johnson of Robbery in the First Degree and charges that at the Towns or Cities of Norwalk, Westport, Fairfield, Bridgeport, Stratford, Milford, Orange, West Haven and New Haven, on or about December 20, 1975 and December 21, 1975, the said Lindsay B. Johnson, William E. Martin, Clinton Martin, Charles E. Spencer and Carlton Bailey did commit a robbery of Jane Gehrett and in the course of the commission of the crime and of immediate flight therefrom, the said Lindsay B. Johnson and other participants in the crime were armed with deadly weapons, to wit: a gun and a rifle and used and threatened the use of dangerous instruments, to wit: knives, in violation of Sections 1(a)(2) and 1(a)(3) of Public Act No. 75-411.

**4th Count**

And the Attorney aforesaid further accuses Lindsay B. Johnson of Sexual Assault in the First Degree and charges that at the Town or City of New Haven, on or about December 21, 1975, the said Lindsay B. Johnson, William E. Martin, Clinton Martin, Charles E. Spencer and Carlton Bailey did compel another person, namely, Jane Gehrett to engage in sexual intercourse by the use force and threat of use of force against the said Jane Gehrett which did reasonably cause the said Jane Gehrett to fear physical injury to the said Jane Gehrett, in violation of Section 3 of Public Act 75-619 and Section 53a-8 of the General Statutes.

Arnold Markle
State's Attorney

Dated: January 9, 1976.

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**SUPERIOR COURT — STATE OF CONNECTICUT**

**STATE'S BILL OF PARTICULARS**

**(Title Omitted in Printing)**

1. Denied. Mulvey, J. February 26, 1976.

2. Approximately between the hours of 10:30 P.M. on December 20, 1975 and 4:00 A.M. on December 21, 1975, at diverse points between South Norwalk, Connecticut and New Haven, Connecticut.

3. Denied. Mulvey, J. February 26, 1976.

THE STATE OF
CONNECTICUT

By Ernest J. Diette, Jr.
Assistant State's Attorney

Filed March 4, 1976

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## JURY INSTRUCTIONS
[Transcript pp. 940-1015]

STATE OF CONNECTICUT : SUPERIOR COURT

VS.

LINDSAY B. JOHNSON : NEW HAVEN COUNTY

[940] (Whereupon a luncheon recess was taken. After the recess, the following testimony was taken.)

THE COURT: Bring in the jury. Gentlemen, stipulate the jury is present.

MR. REDWAY: Yes, your Honor.

MR. SCOTT: Yes, your Honor.

THE COURT: Mr. Scott.

MR. SCOTT: Yes, your Honor. The Defense rests.

THE COURT: You have nothing further?

MR. REDWAY: No, your Honor.

THE COURT: All right. Ladies and gentlemen, that means that we have concluded the presentation of evidence in this case. What would normally follow now is for the arguements by the State's Attorney and the Defense Counsel followed by a charge on the law from me. Because of the hour and because there is a weekend in between, we feel that it would be preferable for you to hear the arguments of Counsel and to receive the charge on the law the first thing Monday morning, and that you would then be able to commence your deliberations rather than having any of that transpire this afternoon, and during the course of the weekend the continuity would be broken. That being the case then I'm going to dismiss you for the day and ask you to return Monday, the Court will be in session on Monday. We'll

[941] begin at 10:00 with the arguments of Counsel. Over the weekend I would urge you again to refrain from discussing any aspect of this case with anyone, with members of your family, friends, business acquaintances, do not read any newspaper publicity with respect to it and do not seek to obtain any information about it from any source. Have a pleasant weekend and we'll see you again Monday morning at 10:00.

Gentlemen, I think we have to conclude the arguments on Mr. Scott's motion with respect to the challenge to the black juror.

MR. SCOTT: Yes, your Honor. I would like for the memo of decision of Judge John Newman to become a part of the file and as an exhibit to my motion. I would simply like to argue that even though the decision of Judge Newman talks in terms of a pattern of discrimination or at least a pattern of excessive usage of the pre-emptory challenges by the U.S. Attorneys in this District, I think the decision is pretty much restricted to that. I think this is the basis for the foundation of my premise that a Defendant on trial, number one, is entitled to a jury of his peers and, number two, our position is that a jury of peers is in fact a jury in which there is an ample opportunity for members of the same race, same racial make-up of the Defendant, to have an
[942] equal opportunity to be selected to serve on jury duty. In this particular case my claim here is very very specific. It's specific to the extent that we are not questioning the right of the State to exercise a pre-emptory challenge; but we do claim that because of the absence or the extreme limitations of minorities or black members on the jury panel, the entire panel, the jury members who are called to serve on the jury that by the time the filtering process takes place, we are faced with a situation where there's a very very small percentage of black jurors who reach the final stage of voir dire.

Upon reaching that stage, if in fact one does reach that stage, he must still face the ultimate exemptory challenge by the State.

We are claiming that although the basic rule is that the State has a right to an exemptory challenge the same as the Defense does, that the exercise of that particular challenge, in this particular case, against witness number 25, Mr. Tolson, was in fact an abuse of the exercise of the pre-emptory challenge by the State. It was quite clear that the actual questions that were raised with respect to this venire man on examination were of the nature that would normally be objectionable by the State, and that the reasons or no reasons actually were necessary to be given, but I think the State recited four
[943] reasons, that none of those reasons were the kind of reasons to justify the exercise of the pre-emptory challenge against that venire man, after he had been accepted by the Defendant.

We feel that the exercise of that pre-emptory challenge under those circumstances in this case against a jury man who my client considers to be his peers, and who had accepted even under those circumstances which normally would have been adverse to him, that the exercise of that particular challenge at that time was clearly prejudicial and without reason, and thus denied my client his constitutional rights to a jury of his peers.

THE COURT: Thank you.

MR. REDWAY: Your Honor, basically the record should reflect that I rest upon remarks that I made at a previous occasions or occasions relative to this issue coming up, except to add that with respect to Mr. Scott's remarks that Mr. Johnson is entitled to a jury of his peers, and that this should consist of a black jury, we are still waiting for him to come up with a case that would support that proposition. He raised that issue, I believe, two months ago and at that time he said he had a lead on a case, but he has not as yet surfaced that case.

[944] With respect to Judge Newman's decision, Judge Newman in that decision, I finally had an opportunity to read it, specifically indicated that that was to apply

to the procedure in the Federal Court. As a matter of fact, he talked about this unique method of jury selection in the Federal Court which he referred to as the structure jury system, that's not the system that we adhere to in the State Court.

Also, Judge Newman refers to a pattern of discrimination and certainly even Mr. Scott does not make any claim that he could support that there's any pattern of discrimination that has prevailed in the State's Attorney's Office in New Haven County.

Judge Newman also has indicated that the law would not be applicable to specific limited cases, and so I can rest as much on Judge Newman's decision as Mr. Scott himself seems to feel that he can. I can live with Judge Newman's decision, it could be applied to my use of the pre-emptory challenge in this case and certainly would not warrant any further action on the part of the Court.

The alternative that Mr. Scott suggests would be that every time a black venire man is called, I just could not exercise a pre-emptory challenge. I would have to accept any black venire man that comes up there unless I state in sufficient fashion what my reason for exer-
[945] cising a challenge is and the Court agrees with that reason. Otherwise to accept Mr. Scott's theory would mean I just can't exercise a pre-emptory challenge and I don't think the law says that.

So, that basically that's all I have, your Honor. I have indicated on previous occasions that I don't think that the motion to dismiss is the proper vehicle, and that it was filed untimely in any event, I think the motion to dismiss should be denied.

THE COURT: It was couched as a motion for mistrial.

MR. REDWAY: Motion for a mistrial, it should be denied.

MR. SCOTT: Can I just clear the record with one respect, your Honor. I did indicate in my original motion an all black jury. I had been informed from a layman's source of such a case having come down from the Courts, and from the best that I can gather, the decision from a legal point of view from a lawyer's point of view was basically this case that I have presented before the Court. That's Judge Newman's decision dealing with the challenge of the black jury and I think the way the information was relayed to me, it came out as if a person was entitled to an all black jury. It didn't sound
[946] right initially, but I had no information at that time other than to protect the record by filing the motion. But what I referred to at that particular time was as best I can gather the case of U.S. versus Robinson and Savaris.

THE COURT: All right. Thank you. The motion is denied.

MR. SCOTT: May I take an exception?

THE COURT: Exception is noted. In that case, gentlemen, I think we'll adjourn for the day and resume, unless you had a further motion. Did you, Mr. Scott?

MR. SCOTT: I was just wondering if your Honor intended to rule on my motions to dismiss?

THE COURT: Motions to dismiss, yes, sir. I have during the luncheon recess availed myself of the opportunity to review my notes which are extensive, and I have determined that the argument is unpersuasive and the motion is denied.

MR. SCOTT: May I have an exception to that also your Honor?

THE COURT: Exception is noted to that also, sir.

MR. SCOTT: I'm not sure, your Honor, whether the record is clear as to whether or not I have on file an

objection, in fact a mistrial motion would be in order, to the testimony solicited by the State with respect to Officer Sweeney and at the time when he he was escort-
[947]ing Mr. Spencer around various areas of New Haven. I had voiced an objection initially to the procedure the way it was handled. Then when we got to the filling station I think your Honor had very clearly set forth the rules that he had to be careful that he didn't indicate what Mr. Spencer either said or did. I think at that point the question was what did Mr. Spencer point out to you, and I think the answer came he pointed out the filling station. If I'm not correct, I'm sure the testimony will reflect it.

In my opinion, I want the record to show an objection at that point to that particular testimony, so that I can have a ruling on it.

THE COURT: I don't recall whether you objected at that time, sir. If you did not, it's a rather untimely objection to be making at this point, and it is too late for it to be ruled upon. If you objected at that time I assume there was a ruling, and I don't have a clear recollection.

MR. SCOTT: Well, as you recall, there were a series of objections.

THE COURT: Yes, I understand that.

MR. SCOTT: But that particular thing came right after the objection, I'm not sure whether it was protected with an exception and an objection. So I just wanted that to show on the record, the original objections still
[948]stand. I would like to pose it and an exception is noted.

THE COURT: Do you have anything further, sir? Do you have any other further motions?

MR. SCOTT: I have nothing further, your Honor.

THE COURT: Then we'll adjourn until Monday morning.

(Whereupon the Court adjourned for the day.)

* * * *

November 1, 1976

[949]

THE COURT: Good morning, ladies and gentlemen. Gentlemen, will you stipulate the jury is present?

MR. REDWAY: Yes, your Honor.

MR. SCOTT: Yes, your Honor.

THE COURT: Mr. Redway?

(Whereupon, the State, by Mr. John Redway, made its opening argument.)

MR. SCOTT: Your Honor, I hate to interrupt the argument of counsel, but I do want to object to any attempt by the State to talk about a robbery of a pocketbook in the course of this proceeding. This is the very first time that evidence has come up at all. There was no claim whatsoever by the State of a pocketbook. It was my understanding we were proceeding on a claim of a robbery of an automobile.

MR. REDWAY: Well, Mr. Scott waits until I reach a point, your Honor, — he can argue that. He has his chance to get up and argue anything he wants, your Honor. But I see no reason why he should interrupt my argument at this particular point.

THE COURT: I think, Mr. Redway, in any event, in your argument just now sir, you indicated the State is
[950] resting its claim of robbery on the alleged taking of the motor vehicle and nothing else, sir. I think Mr. Redway so stated.

MR. SCOTT: I want to make sure.

MR. REDWAY: I said what I meant to say, your Honor. I mean nor more or no less than what I have said in that regard.

MR. SCOTT: I want the record to show the objection.

THE COURT: All right, sir, thank you.

(Whereupon, Mr. Redway resumed and finished his opening argument.)

(Whereupon, the defense, by Mr. Herbert Scott, made its closing argument.)

(Whereupon, the State, by Mr. John Redway, made its closing argument.)

THE COURT: Gentlemen, may I assume that I have all your requests to charge at this point? Did you have any further requests?

MR. SCOTT: Yes, your Honor, I am going to make one motion when the jury is excused.

THE COURT: Ladies and gentlemen, it now comes the time for me to charge you on the law. However, it is a lengthy charge and a complicated one and I think it would be unwise to break it in the middle for the luncheon recess so I think it would be preferable if you
[951] took that recess at this time and when you do return, then I will charge you on the law and you will be able to begin your deliberations immediately thereafter. So we will take the luncheon recess at this time and perhaps it would be well if I could ask you to come back, say, at ten minutes of 2:00 and we will hopefully begin the charge at that time. Thank you.

(Whereupon, the jury left the courtroom.)

MR. SCOTT: If your Honor please, I just wanted to put on the record I would like to move for a mistrial on the basis of Mr. Redway's final argument to the jury, that in the event they do not find the defendant not guilty, there is going to be a third rape. I think that is improperly suggesting to them that they must find him guilty or else there is going to be another rape in the street. I don't think that is proper argument. It is very, very damaging to the Defendant's case and it is not any evidence that came out during the trial.

There is no evidence of any or even on my arguments to the jury nothing concerning what is going to happen if this Defendant is allowed to go free based upon a jury's finding of not guilty. I think that is an improper reference in argument to the jury and I move for a mistrial.

[952] MR. REDWAY: I think that Mr. Scott has made an improper characterization or interpretation of the remarks that I made for the jury. I think that unfortunately unless there was some record that is kept specifically in this regard, that the appellate division has nothing upon which to base his conclusions.

My only feeling is that he is misinterpreting what I said to the jury.

MR. SCOTT: That is why I am putting it on the record, your Honor. It only happened shortly before the conclusion and I want to put on the record what his statement was.

THE COURT: Well, as I heard Mr. Redway's statement, the allusion to a third rape was not as to something that might happen after the trial were over should the defendant be found not guilty. But that the mere finding, I gather, the finding of not guilty would be equivalent to the victim to a third rape in the sense that her testimony was a second one. I don't believe there was an implication in his statement that if the defendant were to be found not guilty, another rape will, in the future, occur. I did not get that, Mr. Scott.

Furthermore, sir, I will, of course, in the course of
[953] my charge, make it very clear to the jury, I certainly intend to, to make it very clear to them that they can find your client guilty on the basis only of the evidence that has been entered into this trial during the course of the trial and that anything that might happen as a result of their verdict is of no consequence and should not be considered in the course of their deliberations. I think with that kind of charge and that kind of emphasis, which I certainly intend to make, that there will be no problem with the statement which Mr. Redway made, which, in fact, I think that you have misinterpreted, in any event.

MR. SCOTT: I think the jury could have drawn the same inference that I did.

THE COURT: I am denying the motion, sir.

MR. SCOTT: May I have an exception.

THE COURT: Exception is noted. All right, we will be in recess until ten of 2:00.

(Whereupon, a luncheon recess was taken; after the recess, the following occurred.)

THE COURT: Summon the jury, please. Gentlemen, will you stipulate the jury is present?

MR. REDWAY: Yes, your Honor.

MR. SCOTT: Yes, your Honor.

[954] BY THE COURT: Ladies and gentlemen, it now becomes my duty to instruct you concerning the law which is applicable to the facts in this case. In doing so, I shall be obliged to restate general comments and principles which form a necessary part of every charge even though some of you may have heard them before.

In this case, as in all cases, you as the jury and I as the Court have separate functions. It is my duty to state the rules of law involved in the decision of the case and it is your duty to find the facts. And in this respect, you are the sole judges of what the facts are. Insofar as I state the law to you, what I say is binding upon you, and it is your duty to follow such instructions.

If, by chance, you have a different idea of what the law is, perhaps what it should be, you must disregard your notions and conscientiously apply the law as I state it to you. In addition, if the law, as I give it to you, differs in any way from the claims made by counsel in argument, then you will dismiss from your minds what they have said to you about the law which is contrary to what I tell you that it is.

Thus, the performance of my duty requires that I
[955] state the rules of law lying at the foundation of the various contentions of the Defendant and the State, and the rules which, when applied to the facts that you find, will lead to your ultimate verdict of guilt or innocence.

In the performance of this duty, it may be necessary that I point out to you the legal effect of certain facts or certain evidence or that I suggest to you certain considerations which you should bear in mind in considering the evidence. Where I assume either of these things, you will heed carefully what I say. As to the questions of fact, you, the jury, are to determine what the facts are by a careful consideration of all the evidence and solely upon the evidence giving to each part of the evidence the weight you consider it deserves in reaching the ultimate conclusion of guilt or innocence.

It is my right to make comments to you as to the weight of evidence or as to the propriety or lack of propriety of your finding certain facts from the evidence. But if I do undertake to make wuch comments, they are merely suggestions to you for you

to approve or disapprove in the exercise of your own sound judgment.

[956] My chief concern with the facts in the case is to refer to them insofar as it is necessary to make clear to you the application of the rules of law applicable to the case at hand. If, therefore, I should refer to certain facts or to certain evidence in the case, you are not to assume thereby to emphasize with particularity those facts or that evidence nor must you limit your consideration only to them.

Should I overlook any evidence in the case, you will supply it from your own and only your own recollection. And should I incorrectly state any evidence in relation to your own recollection, you will correct my error. For after all, it is your function and your duty to weigh all the evidence offered, to make the proper deductions or inferences from the evidence and to determine the facts. And if what counsel have said to you in argument or what I may say to you as to them, except as I have already pointed out, should have weight with you only insofar as you approve it in your own mind.

Now, during the course of this trial, there have been occasions for the attorneys to confer with me out of your hearing. On occasion, I have excused you from this
[957] room so that the point of law or objection which was offered might be urged or argued. In such situations, you should not feel slighted. You are not to muse or venture on what was being discussed. Likewise, you should have no resentment towards the attorney who requested that you be excused.

In the interest of justice and to expedite a trial, it is also perfectly proper that conferences be held right here at this bench between counsel and the Court, because this further serves to avoid the inconvenience of having a jury file out and file back in again. It also serves to prevent the jury from becoming confused on technical legal matters.

During the trial of this case there were objections by counsel, rulings by the Court and then exceptions by counsel. You should have no resentment towards any of the attorneys who raised such objections. You are to consider only such evidence as was admitted, and if some evidence was given but was stricken from the record or some evidence was offered and refused, you must not consider it and you must dismiss it from your minds.

Nor should any inference be drawn from any question whose answer was stricken. The rules of evidence
[958] have been evolved over a span of a great number of years and have proven to be the fairest and the most just. And if, in fact, I have made a mistake on the rulings on evidence, you need not be concerned. There is a way provided in law to correct any error I might have made.

Of course, by the evidence, I mean not only the testimony of the witnesses but all the exhibits and any reasonable inferences which you may draw therefrom. You may draw reasonable inferences from the established facts in the case. The inference which you draw, however, must not be from a guess upon the evidence or a surmise upon the evidence, but it must be from a fact which the evidence has established. Inferences that you may draw from these established facts must be logical and reasonable and well-founded upon facts which have been proven in the trial of this case.

Now, of course in this case as in all criminal cases the accused is presumed to be innocent unless and until he is proven guilty beyond a reasonable doubt. This means that at the moment when he was presented before you for trial, nothing you knew about his past or
[959] might surmise or guess about his past should be considered by you at all. That his slate was wiped clean at that moment, and he stood before you free of any bias, prejudice or burden arising from his position as the accused.

Insofar as you are concerned, he was then innocent and he continues innocent until such time as the evidence and the matters produced here in this courtroom and in the orderly course of this trial satisfy you beyond a reasonable doubt that he is guilty.

Up to the moment you are so satisfied, from what has taken place here in court, that he is guilty, and so far as you are concerned up to that moment he is innocent of the crimes with which he is charged. And this presumption requires that if any piece of evidence offered is capable of two reasonable constructions, one of which is consistent with innocence, it must be given that construction. The accused person does not have to prove that he did not commit the offenses with which he is charged. The State must prove that he did.

The burden then is on the State to prove the accused guilty with respect to each of the crimes with
[960] which he is charged and he does not have to prove his innocence. He may remain silent.

During the trial of this case, there was a period when the defendant was absent from the courtroom. You should not draw any inference one way or the other from that fact. As to the question of his innocence or guilt, you must not consider it and you must dismiss it from your mind.

The State, again, must prove every element necessary to constitute each of the crimes as charged as I shall explain them to you in a moment and it is not enough for the State to prove certain of those elements. Because if proof of even one of them is lacking, you would have to find the accused not guilty of that crime.

The State, in other words, can sustain the burden resting on it only if the evidence before you establishes the existence of every element constituting the crime charged beyond a reasonable doubt.

Now, this presumption of innocence does not have the effect of evidence itself, the only effect it has is to place upon the State the burden of establishing all the
[961] elements necessary to prove guilt beyond a reasonable doubt. The phrase "reasonable doubt" has no technical or unusual meaning. You can arrive at the real meaning of it by emphasizing the word reasonable.

A reasonable doubt is a doubt for which a valid reason can be assigned. It is a doubt which is something more than a guess or a surmise. It is not a conjecture or a fanciful or captious doubt. A reasonable doubt is not a doubt which is raised by someone simply for the sake of raising doubts, nor is it a doubt suggested by the ingenuity of counsel or a juror which is not warranted by the evidence.

Proof beyond a reasonable doubt precludes every reasonable hypothesis except that which it tends to support and is consistent with the Defendant's guilt and is inconsistent with any other rational conclusion. A reasonable doubt, in other words, is a real doubt, an honest doubt. A doubt which has its foundation in the evidence or the lack of evidence. It is such a doubt as in the serious affairs which concern you in everyday life you would pay some heed to.

Now, of course absolute certainty in the affairs of
[962] life is almost never attainable. And the law does not require absolute certainty on the part of the jury before it returns a verdict of guilty. What the law does require, however, is that after hearing all the evidence, if there is something that in that evidence or lack of evidence which leaves in the minds of the jurors as reasonable men and women a reasonable doubt of the guilt of the accused, then the accused must be given the benefit of that doubt and acquitted.

It necessarily follows then as I have told you that if any fact or element bears equally to ways, one towards innocence and the other towards guilt, then it must be

given that direction which tends towards innocence. In other words, it is enbumbent on the State to negative every supposition not in itself unreasonable or improbable which is consistent with the innocence of the accused.

If you can in reason reconcile all the facts proved with any reasonable theory consonant with the innocence of the accused, then of course you cannot find him guilty.

Now, the credibility of the witnesses and the weight
[963] to be accorded their testimony are matters entirely within your hands and your sole function to determine. No fact, of course, is to be determined merely by the number of witnesses because you are interested primarily in the quality of the testimony offered and not in its quantity. In weighing the testimony of the several witnesses, you will consider their appearance on the witness stand and in court; any interest or possible bias which they might have, either for or against the State or the accused; and their ability to observe facts correctly and relate them to you truly and accurately.

You should test the evidence by your own knowledge of human nature and the motives that influence and control human beings. In short, you should bring to bear on the testimony of the several witnesses the same considerations and use the same sound judgment that you would apply to questions of truth and veracity as they present themselves to you in everyday life.

You are entitled to accept any testimony which you believe to be true and to discredit either wholly or in part the testimony of any witness you believe has testified untruthfully or erroneously. The credit that you
[964] will give to the testimony offered as I have told you is something which you must determine.

Where a witness testifies inaccurately and you do not think that the inaccuracy was consciously dishonest,

you should bear that in mind and scrutinize the whole testimony of that witness. The significance that you would attach to it would vary more or less with the particular fact as to which the inaccuracy existed or the surrounding circumstances, which, in your mind, ought to have impressed it upon, and caused a corrrect retention of it to be made in the mind or memory of the witness. It is after all, a question for you, ladies and gentlemen, to pass upon.

If you find that there has been inaccuracy in one respect upon the part of a witness, remember it in judging the rest of his or her testimony and give to it that weight which your own minds lead you to think it ought to have, and which you would attach to it in the ordinary affairs of life where anyone came to you in a matter and you found that, in some particular, he or she was inaccurate.

If, however, you conclude that a witness has not
[965]only testified falsely but that he or she has done that intentionally or willfully, this fact casts a very serious doubt upon all of his or her testimony and you might well conclude that you cannot accept any of it. This, however, is a matter for you to determine.

Even though you find that a witness intentionally gave false testimony as to certain matters, you may find that as to certain other matters that witness gave testimony worthy of acceptance by you as true. After all, whether you should regard all of his testimony or believe some part of it again, as I said, is for you to decide.

And now, of course, throughout this charge when I refer to his or he, ladies and gentlemen, I am, in effect, referring to each and every witness both male and female and I will be using the male pronoun probably simply for ease of expression.

As you will remember, there was testimony here from police officers. And, as I have told you before this

case started, the testimony of a police officer is entitled to no special or exclusive sanctity merely because it comes from a police officer. A police officer who takes the witness stand subjects his testimony to the same
[966] examination and the same tests that any other witness does. And in the case of police officers, you should not believe nor disbelieve them merely because they are police officers.

You should recall their demeanor here on the stand, consider their training, if any, in the field in which they gave evidence, their manner of testimony, the substance of their testimony, their capacity for observing facts and relating them to you accurately, and then weigh and balance it just as carefully as you would the testimony of any other witness.

Similarly, in weighing and considing the testimony of persons testifying as expert witnesses, as in this case, in determining to what extent you will attach weight to the opinions which they gave, you are to apply to them the same tests that you apply to any other witness insofar as it relates to interest, bias or prejudice, appearance, demeanor, frankness, candor and so forth.

You are to determine whether these witnesses are possessed of a peculiar and exclusive knowledge and experience in a specialized field. The value which is to
[967] be attached to their testimony and the weight to be accorded it will depend on many things such as their actual skill and experience and training.

In this case, the State is relying upon both direct evidence and circumstantial evidence. Now, direct evidence of an event is the testimony of an eyewitness who comes into court and says that he saw an event happen; for example, the testimony of Miss Gehrett.

Circumstantial evidence, on the other hand, is the testimony of witnesses to the existence of certain facts or happenings or other events from which the jury may logically conclude that the event in question did happen,

such as the evidence offered by the State concerning fingerprints and footprints and the finding of the defendant and others in Miss Gehrett's car. It is up to you to accept or reject all or any part or any part of this evidence.

However, the law raises no distinction between direct evidence and circumstantial evidence. And it is your duty to consider circumstantial evidence in the same way you consider direct evidence. The only practical difference between direct and circumstantial
[968] evidence is that when you have direct evidence of the commission of a crime, you, as the jury, have only to pass upon the credibility of the direct testimony given. Whereas with circumstantial evidence, you must first determine the credibility of the witness and decide whether the facts testified to exist, and then decide whether the happening of those events or the existence of those facts forces you logically to conclude that other facts existed and other events occurred.

You should have no hesitancy in using circumstantial evidence in this way. Your duty, irrespective of whether the evidence is direct or circumstantial, is to examine the source from which it comes, its probability or improbability and then to ask yourselves if the evidence is trustworthy. You should also consider the opportunities of a witness for observation, the impression which the witness made upon you as to his powers of observation. The reasonableness of the story told, and then consider what other reasonable and fair conclusions or inferences that can be drawn.

All evidence, direct or circumstantial, must be
[969] reliable and of sufficient weight to satisfy you beyond a reasonable doubt. One of the elements common to each of the four charges in the Information is intent. And I will discuss this in more detail as I explain the elements of each offense to you.

However, the question of intent should cause you no great concern because intent is a question of fact that is

solely within your province as jurors. However, you should be aware of a rule of law that will be helpful to you and that is that a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act. There is also a concept in our law called consciousness of guilt which is relevant in this case since the Defendant's state of mind, with respect to intent, is at issue.

Whenever any person is on trial for a criminal offense, it is proper to show his conduct subsequent to the alleged criminal act or in this case acts as alleged by the State because such conduct often tends to show a guilty connection by the accused with the crimes charged. Thus, if you believe the testimony of Miss Gehrett, the State would suggest that the Defendant,
[970] Mr. Johnson, evidenced a conscious awareness of guilt of the kidnapping and the sexual assault by attempting to dispose of the victim at the West River Bridge.

So also if a person is proven to have been at the scene of a crime, flight from that scene, although not necessarily conclusive of guilt, is often an accompanying or attendant condition of guilt and the rules of law establish its admission in evidence as tending to prove guilt. It does not raise a legal presumption of guilt but is to be given such weight as the jury thinks it is entitled to under the circumstances.

Motive on the part of the Defendant is not an element of the crimes charged and the State is not required to show a motive of the Defendant to commit any of those crimes. Nevertheless, the State has offered evidence which you may accept or reject as to the Defendant's motives with respect to the various charges. For example, that the victim was kidnapped to obtain her car. But if you believe Miss Gehrett's testimony, the Defendant and the others needed one in good condition so as to commit a robbery. If believed by a jury, such evidence is significant because motive is an

[971] incentive or intention that causes a person to do something or to act in a certain way. Thus, motive is evidence of intent. One who acts with a motive evidences an intention.

In this respect, therefore, motive forms an important factor in the inquiry as to the guilt or innocence of the Defendant. And I will now discuss with you the specific charges brought against Mr. Johnson and the elements of the crime charged. These crimes are charged in what is referred to as an Information and you will have the Information with you in the jury room when you are deliberating. The Information is the formal presentation of the State's charges and, of course, the Information itself does not have the force of evidence.

The State has charged the Defendant in the first count of the Information with criminal attempt to commit murder. The charge reads as follows: "At the Towns or Cities of New Haven and West Haven on or about the 21st day of December, 1975 the said Lindsey B. Johnson, William E. Martin, Clinton Martin, Charles E. Spencer and Carlton Bailey, with intent to cause the
[972] death of another person, namely Jane Gehrett, did attempt to cause the death of such person in violation of certain sections of the General Statutes."

Now, this charge is based on a statute which reads in pertinent part as follows: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for the commission of the crime he intentionally does or omits to do anything which, under the circumstances, he believes them to be an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. Conduct shall not be held to constitute a substantial step unless it is strongly corroborative of the actor's criminal purpose."

The first element then which the State must prove beyond a reasonable doubt to sustain a conviction of the

accused on this charge is that he has the specific intent to commit murder. And this requires that the crime of murder be explained to you.

A person commits a murder when, with intent to cause the death of another person, he causes the death of such person. Therefore, on this phase of the case, the
[973] first question you must ask is this: What intention did the Defendant have in mind? Did he alone or participating with others intend to commit the crime of murder? Did he alone or participating with others intend to cause the death of Jane Gehrett?

Now, on one can look into a man's mind and see what his intention is. The only way to decide that question is to infer from the accused's conduct in the light of the surrounding circumstances. But as previously stated, every person is conclusively presumed to intend the natural and necessary consequences of his act.

The State has offered evidence concerning a Defendant's conduct towards Miss Gehrett at the bridge and suggests that by his actions he intended to murder her. Of course, you as jurors may believe or disbelieve all or any part of Miss Gehrett's testimony in this regard as you deem proper. If you believe her version as to the Defendant's conduct at the bridge, you may presume he intended what would be the natural and necessary consequences of his actions, under the prevailing circumstances and conditions; for example, the temperature of air and water and the force used against her person.

[974] If, upon all the evidence, you conclude beyond a reasonable doubt that the Defendant had formed in his mind the intention to cause the death of Miss Gehrett, your next question is whether he intentionally did or omitted to do anything which, under the circumstances, as he believed them to be, was an act or omission constituting a substantial step in a course of conduct planned to culminate in her death. And a person acts

intentionally with respect to a result or to conduct when his conscious objective is to cause such result or to engage in such conduct.

You have heard the evidence concerning the Defendant's conduct on the night in question. It is for you to determine on the evidence whether the State has proved beyond a reasonable doubt first that Mr. Johnson intended to cause the death of Jane Gehrett, and second was that with that intent he intentionally did anything which, under the circumstances as he believed them to be, was an act constituting a substantial step in a course of conduct planned to culminate in her death.

If you find that the State has proved each of these
[975] elements beyond a reasonable doubt, you must find the Defendant guilty of criminal attempt to commit murder. If you do not find the State has proved each of these elements beyond a reasonable doubt, then you must find him not guilty on this first count.

In the second count, the State has charged the Defendant with kidnapping in the second degree. In that the accused, Lindsey B. Johnson, and charged that at the Towns or Cities of Norwalk, Westport, Fairfield, Bridgeport, Stratford, Milford, Orange, West Haven and New Haven, on or about December 20, 1975 and December 21, 1975, the said Lindsay B. Johnson with the other gentlemen who have previously been named did abduct another person, namely Jane Gehrett, in violation of Section 53a-94 and 53-8 of the General Statutes.

Now, although in the Information Mr. Johnson is specifically charged with the crime of kidnapping in the second degree, under the evidence in this case, such a crime embodies three crimes which I will now discuss with you. If, after you have considered the evidence you find that the State has not proven beyond a reasonable doubt that the accused is guilty of the crime of kidnapp-
[976] ing in the second degree, then you will consider whether

the accused is guilty of unlawful restraint in the first degree or unlawful restraint in the second degree. And this is so because the crime of kidnapping in the second degree includes the lesser crimes of unlawful restraint in the first degree and unlawful restraint in the second degree; and if the greater crime is not so proven, you may consider the lesser crimes included in the greater crime charged.

Now, ladies and gentlemen, when I charge you on lesser included crimes, this is not a direction to you to find that the accused committed a lesser crime if you do not find him guilty of the crime with which he stands charged. You may find that the evidence is sufficient to find him guilty of any crime under that count. This is only an explanation that if the greater crime, that is the more serious crime, is not proven by the State beyond a reasonable doubt against the accused, then you may consider the next lesser crime in degree and if that crime is not so proven beyond a reasonable doubt, then you will consider the next lesser crime in degree and so forth.

[977] If, after you have considered all of the crimes that I shall instruct you about in a moment, and you find that none of them were proven beyond a reasonable doubt, then, of course, your verdict would be not guilty.

Now, Section 53a-94 of our Penal Code provides in part as follows: "A person is guilty of kidnapping in the second degree when he abducts another person." There can be no kidnapping unless you find that the alleged victim has been abducted. And abduct means to restrain a person with intent to prevent his liberation by either secreting him or holding him in a place where he is not likely to be found or using or threatening to use physical force or intimidation. That is what abduction means.

The next words that you come to that require definition is the word restraint which the Legislature has defined as follows: "Restrain means to restrict a

person's movement intentionally and unlawfully in such a manner as to interfere substantially with his liberty, by moving him from one place to another or by confining him either in a place where the restriction commences or in a place to which he has been moved without his consent."

[978] Now again, as I will remind you when I use the masculine gender obviously it also includes the feminine. In this last definition I read to you, the word "intentionally" appears and again I charge you that a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. I have already instructed you that what a man's intention has been is necessarily very largely a matter of inference. Again, no witness can be expected to come here and testify that he looked into another man's mind and saw therein a certain intention. The only way in which you can determine in a case such as this what a man's intention was at any given time is by determining what his conduct was and what the circumstances were surrounding that conduct and from those infer what his intention was.

As stated before, to draw such an inference is not only the privilege but also the duty of a juror provided, of course, the inference to draw is a reasonable inference.

Now, the statute also uses the word "unlawfully" and unlawfully obviously means without right. So a
[979] person acts unlawfully when he does so without right.

Now, I will tell you again what the section is we are dealing with and you should bear in mind all the definitions which I have just given to you. A person is guilty of kidnapping in the second degree when he abducts another person. The laws which make kidnapping criminal punish interference with personal liberty in restricting the victim's freedom of movement,

so you cannot find kidnapping until you find it established that there was such restriction of movement and that it has been done intentionally, that it has been done without right or authority of law, and that it has had the effect of interfering substantially with the alleged victim's liberty.

There is no requirement to make interference with freedom of movement or liberty and unlawful restraint that it lasts for any fixed minimal period of time, although the length of time it did last may be considered by you in determining intention and in appraising the seriousness of the consequences. Having considered the necessity for unlawful restraint, we must now think about the element of abduction which is an indispensable part of the guilt of kidnapping.

[980] As I said before, there can be no kidnapping without abduction. Abduction may be established by satisfactory proof that the alleged victim has been unlawfully restrained and that with intent to prevent her liberation, the defendant has done either one of two things. First of these is that he secreted or held the alleged victim in a place where she was not likely to be found. The second is that the restraining was accomplished by using or threatening to use physical force or intimidation.

Abduction need not be proved by establishing the use of force or intimidation if the proof establishes that the accused threatened its use in such manner that the alleged victim reasonably believed that force would be applied to her if she sought to escape or to thwart her abductors' intention.

The essential nature of kidnapping requires then that before you convict you must find that the restraint and abduction were effected against the alleged victim's will or at least without her consent. The consent required, however, must be more than just a mere surface acquiescence.

[981] If the acts complained of were accomplished by the use of force or violence, it is obvious that no further proof is required to establish lack of consent upon the alleged victim's part. Similarly acquiescence can be secured by fraud or deception and that would not be deemed consent. I have pointed out to you that the restraint which is the basis of the crime of kidnapping of which the Defendant stands charged must have been imposed by the Defendant without the victim's consent.

The victim's want of consent, that is the victim's lack of consent, like all other essentials of the offense, is a fact which the prosecution is required to establish beyond a reasonable doubt. But in examining the evidence, there are rules of law which you must consider and apply.

If you find that there was an unlawful restraint of the alleged victim by the Defendant, and that the Defendant accomplished it by moving her from one place to another or by confining her, and that the Defendant did this by physical force or intimidation, proof of actual lack of consent becomes unnecessary because our law makes the use of such force or intimida-
[982] tion the equivalent of actual lack of consent.

What constitutes physical force I need not specifically tell you because these words are not technical and are used in their everyday context. It is for you to decide whether the evidence proves that physical force was used by the Defendant and whether it actually produced and resulted in the accomplishment of the restraint which is charged. But even the use of physical force need not have been proved if the evidence in your estimation proves that the restraint was accomplished by intimidation.

This requires that the Defendant's words or acts on the occasion must have sufficed to place victim in a state of fear, such intimidation may be found in a threat or threats to inflict injury made by one with the apparent power to carry out such threats.

In any event, to constitute intimidation and thus remove the need to prove actual lack of consent, the proof must convince you that the words or acts of the Defendant under the circumstances appearing and at the time and place in question enabled the Defendant to carry out and effect the restraint or removal by placing the alleged victim in terror.

[983] To sum up then, the elements of the crime of kidnapping in the second degree are as follows: First, the Defendant must restrain the victim. That is, the Defendant must restrict the alleged victim's movements intentionally and unlawfully in such a manner as to interfere substantially with her liberty by either moving her from one place to another without her consent or by confining her in some place either where the restriction begins or in some other place to which she has been moved without her consent.

Second, the Defendant must abduct the victim, that is as applicable to this case the Defendant must restrain the alleged victim with the intent to prevent her liberation by using or threatening the use of physical force or intimidation.

If you find the Defendant restrained Jane Gehrett and used or threatened the use of force against her, with the intent to prevent her liberation, this element of the crime is proven. If you find both the elements proven by the State beyond a reasonable doubt, you may stop right there and find the Defendant guilty of kidnapping in the second degree.

[984] However, if you do not find both these elements have been proven beyond a reasonable doubt, you cannot convict the Defendant of kidnapping in the second degree and you must then proceed to examine the evidence in the light of my charge as to the lesser offenses.

The next lesser offense in degree would be unlawful restraint in the first degree Section 53a-95 of our Penal

Code provides that a person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose the latter to a substantial risk of physical injury. You will recall that I have already defined for you the meaning of the word restrain. The elements of unlawful restraint in the first degree then are as follows: First, the Defendant must restrain the victim as that term has been defined for you, and second, the restraint must be under circumstances which expose the victim to a substantial risk of physical injury, and physical injury means impairment of physical condition or pain.

If you find these elements to have been proven beyond a reasonable doubt, then you may stop there and your verdict would then be guilty of unlawful
[985] restraint in the first degree. However, if you find that either of those two elements has not been so proved, you cannot render such a verdict and you must then consider the last and least included offense under this count of the Information which is the crime of unlawful restraint in the second degree.

Section 53a-96 of the Penal Code provides that a person is guilty of unlawful restraint in the second degree when he restrains another person. And you will recall I have already defined the term restraint and you will take that definition into consideration in connection with this crime.

Now, ladies and gentlemen, this charge has been long and it is a difficult charge and I am going to briefly attempt to recapitulate it for you as to just what is involved within the four corners of this count charging the accused with the crime of kidnapping in the second degree. So you will first consider the offense of kidnapping in the second degree. For kidnapping in the second degree, you must find proven beyond a reasonable doubt two things. First, restraint; and second, abduction. You must find both.

[986] If the State has failed to prove these two elements beyond a reasonable doubt, you will next consider unlawful restraint in the first degree. For unlawful restraint in the first degree you must find proven beyond a reasonable doubt first, restraint and second, that that restraint exposed the alleged victim to a substantial risk of physical injury. Again, you must find both and if the State has failed to prove the two elements beyond a reasonable doubt, you will then consider unlawful restraint in the second degree.

For unlawful restraint in the second degree, you must find proven beyond a reasonable doubt simply restraint. If you do not find this element proven beyond a reasonable doubt, then you will find the Defendant not guilty as to the second count of the Information.

The Information in the third count charges that the Defendant committed the crime of robbery in the first degree as follows: At the Towns or Cities of Norwalk, Westport, Fairfield, Bridgeport, Stratford, Milford, Orange, West Haven and New Haven, on or about December 20, 1975 and December 21, 1975, the said
[987] Lindsay B. Johnson and the other gentlemen whom we have already mentioned did commit a robbery of Jane Gehrett and in the course of the commission of the crime and of immediate flight therefrom the said Lindsey B. Johnson and other participants of the crime were armed with deadly weapons, to wit, a gun and a rifle, and used and threatened the use of dangerous instruments to wit, knives, in violation of Sections 1(a) (2) and 1(a) (3) of Public Act 75-411.

Now, our Penal Code defines robbery as follows: A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of, one, preventing or overcoming resistance to the taking of property; or to the retention thereof immediately after the taking; or, two, compelling the owner of such property or another person to deliver up

the property or to engage in other conduct which aids in the commission of that larceny.

The gist of the crime of robbery is the act of committing a larceny by force or the threat of force. First you must determine whether the Defendant was
[988] committing a larceny and if you do not find the Defendant was committing a larceny, then you must return a verdict of not guilty. Under our Penal Code, a person steals property and commits larceny when, with the intent to deprive another of money or other property or to appropriate the same to himself or a third person, he wrongfully takes, obtains, or withholds such money or other property from an owner.

The State must prove that the property was taken by the Defendant with the specific intention of depriving the owner or some other person of it or of appropriating it to himself or to some third person.

To intend to deprive another of property means intending to withhold it or cause it to be withheld from him permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to him or intending to dispose of the property in such a manner or under such circumstances as to render it unlikely that an owner will recover such property.

To intend to appropriate property to ones self or a
[989] third person means intending to exercise control over it or to aid a third person to exercise control over it, permanently or for extended a period or under such circumstances as to acquire the major portion of its economic value or benefit or intending to dispose of the property for the benefit of the third person.

The property must have been taken by the Defendant for the purpose of keeping or using it permanently or virtually so or of disposing of it in such a way as to result in a permanent or virtually permanent loss of the property to the owner. For

example, it would not be larceny to borrow a car for a joy ride, intending to return it or leave it with the owner who will probably recover it after a relatively short time. On the other hand, the fact that a thief took possession of the property for only a short time would not necessarily mean that he did not intend to keep it or deprive the owner of it permanently.

He may have been apprehended soon after the theft or may have had no opportunity to fulfill his original intention. Since this wrongful or felonious intention of depriving a person or property or appropriating the
[990] property to oneself or a third person must be proved, it would not constitute larceny where someone took property under the honest impression, however mistaken, that he had a right to do so, or where he took some property that he honestly believed had been abandoned or where he took property intending to return it to the true owner, or where he honestly believed he had permission to take the property.

It is only where the taker has wrongful or dishonest intention, as I have defined for you, that the crime of larceny would have occurred. It is essential, therefore, that the State prove beyond a reasonable doubt that the Defendant had this unlawful purpose or intention in his mind at the time he took the property.

In addition to this mental element of the crime, the State must also prove that the Defendant wrongfully took, obtained, or withheld the property from the owner. Larceny includes any wrongful taking of property away from the possession or control of the person who is entitled to it, whether by stealth, force or other unlawful means. It also constitutes larceny to withhold property
[991] from an owner wrongfully.

The word wrongfully means that the taking, obtaining or withholding, which is the subject of the larceny, must have been without any legal justification or excuse. And the acts of wrongfully taking, obtaining or withholding must be accompanied by the unlawful

purpose or intention of depriving another person of the property or of appropriating it to oneself or a third person.

Then the State must prove not only that the Defendant committed acts which constitute a wrongful taking, obtaining or withholding of property, but also that he so acted with the wrongful intention we have just discussed. And it is also essential for the crime of larceny that the property involved be taken from an owner.

The word owner as used in the statute means not only the so-called true or lawful owner but any person who has a right to possession which is superior to that of the Defendant. This would include agents or other persons having possession or custody of property with the permission or authority of the true owner.

[992] For example, there is evidence in this case, as I recall, that the car which is the subject matter of the alleged robbery was registered in the name of Miss Gehrett's father, but that she was using it with his permission.

The type of property which may be the subject of larceny is broadly defined as meaning any money, personal property, thing in action, evidence of debt or contract or article of value of any kind. In this case, the State claims to have offered evidence to prove a larceny of the automobile I just referred to and also, I believe there was reference to Miss Gehrett's purse.

If you believe the testimony of the Norwalk Police Officer, the Defendant was found in the victim's car shortly after a complaint was made to the police by the victim. Now, his mere presence in the vehicle without more is not sufficient to warrant an inference of guilt of theft. However, if you believe that testimony, you may infer from possession of property recently stolen if unexplained or standing alone or without other facts

pointing to a contrary conclusion, that the possessor stole the property. The key word is "possession."

[993] Possession ordinarily signifies an intentional control of a designated thing accompanied by knowledge of its character. Was the Defendant in possession of property recently stolen? If you determine no, then what I have said with respect to an inference does not apply. It is important to note, also, that the inference is one of fact and may but need not be drawn by you as the trier of fact as you see fit.

Now, if you do not find beyond a reasonable doubt that the Defendant was committing a larceny, you need go no further and should find the Defendant not guilty on this count. If you do find beyond a reasonable doubt that the Defendant was committing a larceny, you must next determine whether that larceny was accompanied by the use or the threatened use of physical force.

Now, we have already discussed the term "physical force," to repeat it is a common, readily understandable expression. It means the application of external physical power to the person. It can be effected by the hand or foot or other part of the actor's body applied to the victim's body. It can be applied by an instrument or a weapon. In other words, the expression is general and unlimited in regard to the means by which it can be
[994] applied or inflicted.

Physical force against a person can take many forms. It can be accomplished by the use of a gun or other dangerous instrument or by physical struggle with a victim or similar assault of conduct. But such physical force or the threat of it must be for the purpose of perpetrating the larceny.

Fear may be an ingredient of robbery and result from the force applied or threatened but it is not a necessary element of a robbery. A robbery can be accomplished without fear on the part of the victim. If you find that no actual physical force was inflicted upon

the person of Miss Gehrett but that she was threatened with physical force, you must also find, in order to sustain a verdict of guilty, that the Defendant threatened the victim with the immediate use of force.

In other words, if you find that she was threatened with future physical harm, you must return a verdict of not guilty to a charge of robbery. If you find that physical force was used or its use immediately threatened against Miss Gehrett in the course of the commission of a larceny, you must next determine
[995] whether such physical force was used for the purpose of preventing or overcoming resistance to the taking of the property or to its retention immediately after the taking.

If force is used or its use immediately threatened to prevent or overcome resistance to the taking or retention, a robbery is committed provided you have made the other preliminary findings which I have already indicated are essential. As I have already stated, the victim need not be the owner to make out a case of robbery and may be any person temporarily or otherwise in possession or control of the property.

If you do not find beyond a reasonable doubt that the Defendant committed a robbery as I have explained robbery to you, you must return a verdict of not guilty. If you do find beyond a reasonable doubt that the Defendant committed a robbery, you will then consider the degree of robbery. As applicable to the third count of the Information then, our law provides that a person is guilty of robbery in the first degree when, in the course of the commission of the crime or of immediate flight
[996] therefrom, he or another participant in the crime is armed with a deadly weapon or uses or threatens the use of a dangerous instrument. Robbery in this case then becomes first degree only when one of these two aggravating factors occurs in the course of the commission of a robbery or in the immediate flight from the crime.

Accordingly, if any person who participated in the crime used or threatened to use a dangerous instrument or was armed with a deadly weapon, either during the crime or while in immediate flight from the crime, all persons participating in the crime would be guilty of first degree robbery.

Now, a deadly weapon means any weapon from which a shot may be discharged, as applicable to this case. Nothing further need be shown by the State other than the possession of such a weapon by the defendant, or by a participant in the commission of the crime or flight therefrom. Under the definition, a weapon from which a shot may be discharged, such as an ordinary revolver or rifle, whether or not loaded at the time of
[997] the offense, is classified as a deadly weapon. And armed means furnished or equipped with it.

A dangerous instrument means any instrument, article or substance which, under the circumstances in which is used or attempted or threatened to be used is capable of causing death or serious physical injury. There is no specific listing of articles which, by their very nature, constitute dangerous instruments, any article without limitation and even though harmless under normal use, may be found by you to be a dangerous instrument if, under the circumstances of its use or threatened use, it is readily capable of producing serious physical injury or death.

If you find beyond a reasonable doubt that a robbery was committed and, in the course of the commission of the crime or immediate flight therefrom, the defendant or any other participant in the crime either was armed with a deadly weapon or used or threatened the use of a dangerous instrument as I have explained them to you, you should return a verdict of robbery, guilty of robbery in the first degree. If you find that neither of these aggravating factors did occur, but
[998] you do find beyond a reasonable doubt that the Defendant committed robbery, you should return a verdict of robbery in the third degree. Of course, if you conclude

that the accused committed no robbery, then your verdict must be not guilty as to this count.

In the fourth count of the Information, the Defendant is charged with sexual assault in the first degree as follows: That at the Town or City of New Haven, on or about December 21, 1975, the said Lindsey B. Johnson and the other gentlemen who were named before did compel another person, namely, Jane Gehrett, to engage in sexual intercourse by the use of force and threat of use of force against the said Jane Gehrett which did reasonably cause the said Jane Gehrett to fear physical injury to the said Jane Gehrett in violation of Section 3 of Public Act 75-619 and Section 53-a(8) of the General Statutes.

Our Penal Codes provide in pertinent part that a person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such person or by the threat of use of force against such
[999] person which reasonably causes such person to fear physical injury to such person.

For the purpose of this statute, sexual intercourse means vaginal intercourse, anal intercourse and fallatio or cunnilingus that is contact between the mouth and the male or female genitals, between persons regardless of sex. Penetration must be found but penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen.

Its meaning is limited to persons not married to each other, that is a man cannot be found to have sexually assaulted his wife.

The use of force means use of a dangerous instrument or use of actual physical force or violence or superior physical strength against the victim.

Dangerous instrument has previously been defined for you as any instrument or article which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury.

You have heard the evidence concerning the conduct
[1000] of the parties at the time in question. It is for you to determine on the evidence whether the Defendant compelled Jane Gehrett to engage in sexual intercourse by the use of force against her or by the threat of use of force against her which reasonably caused her to fear physical injury to her person as those terms have been defined to you. And, under the statute, you must also find that Miss Gehrett and the accused were not married to each other. There has been no claim that such is the case and I assume, gentlemen, that you are prepared to stipulate that these parties are not married to each other.

The victim, Jane Gehrett, testified as to sexual acts perpetrated against her by the Defendant, Mr. Johnson, and others. As jurors, you may accept or reject any or all of her testimony. In any event, her testimony is in the nature of what is called direct evidence and the State could have rested its case solely upon that testimony. In other words, corroboration of any of the facts of her testimony is not required under the law. This is not to suggest that the State's case is necessarily without corroboration, obviously the State does claim that there is sufficient corroboration of the
[1001] criminal charges. However, this is for you to decide and I am merely instructing you that corroboration is not necessary under law to warrant a conviction of sexual assault.

If you find that the State has proven beyond a reasonable doubt each of the elements of sexual assault in the first degree, as I have explained them to you, you must find the Defendant guilty of that charge. If you do not so find, then you may consider whether the State has proven the Defendant guilty of the next

applicable lesser included offense which is sexual assault in the third degree.

The Statute provides in pertinent part that a person is guilty of sexual assault in the third degree when such person compels another person to submit to sexual contact, by the use of force against such person or by the threat of the use of force against such person, which reasonably causes such person to fear physical injury to such person.

Now, whereas sexual assault in the first degree involves the element of sexual intercourse, third degree sexual assault involves the element of sexual contact. And sexual contact means any contact with the intimate
[1002] parts of a person not married to the actor for the purpose of sexual gratification of the actor. Intimate parts means the genital area, the groin, anus, inner thighs, buttocks or breasts. And I have already defined the meaning of the phrase "use of force."

If you find beyond a reasonable doubt that the State has proved the Defendant compelled Miss Gehrett to submit to contact by the defendant with the intimate parts of her body for the purpose of his sexual gratification by the use of force or the threat of the use of force, which reasonably caused her to fear physical injury to her person, then you would find him guilty of sexual assault in the third degree.

If you do not so find, you may then consider whether the evidence supports a finding of guilty of sexual assault in the fourth degree. Now, a person is guilty of sexual assault in the fourth degree when such person subjects another person to sexual contact without such other person's consent. The elements then are sexual contact which I have just defined for you and lack of consent on the part of the victim.

If you find beyond a reasonable doubt that the
[1003] defendant subjected Miss Gehrett to sexual contact without her consent, you must find him guilty of sexual

assault in the fourth degree. If you do not find that the State has proved this beyond a reasonable doubt, then you would find the defendant not guilty.

With respect to your consideration of the innocence or guilt of the Defendant as to the charges against him, and these lesser offenses included within those charges as I have explained them to you, if you find that the State has failed to prove beyond a reasonable doubt as to any of them that such offense was committed by the immediate act of Mr. Johnson, you must then consider whether the evidence proves beyond a reasonable doubt his guilt as to that offense under the provisions of Section 53a(8) of the General Statutes which provides that a person acting with the mental state required for the commission of an offense who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense, shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

[1004] If Mr. Johnson did any of these things specified in the statute, he is, in the eyes of the law, just a guilty of the crime as though he had directly committed it or directly participated in its commission. The statute does not connect the various things it specifies with the word "and" but instead specifies them with the word "or." That is, the accused is guilty of the crime charged if he intentionally aided in its commission or if he solicited it or requested it or importuned it or commanded it to be done. And the words of the statute are, I think, clear except perhaps the word importune and there the question is did the defendant encourage and incite the commission of the crime.

To find him guilty under this statute, however, you must decide that he did more than be inactively present at the commission of the crime or passively acquiescent or innocently perform certain acts which did, in fact, aid in the commission of the offense. A person who is present when a crime is committed but neither assists in

its commission nor shares in the criminal intent of the perpetrator of the crime cannot be convicted as an
[1005] accessory unless the defendant had a criminality of intent and an unlawful purpose or purposes in common with the actual perpetrator of the crime. He could not be found guilty under this statute. The fact that in this case only one alleged participant is being tried, although there may be others, should cause you no trouble, if you find beyond a reasonable doubt that Mr. Johnson actually was either an active principal or accessory, as I have explained it to you, in the commission of the offenses with which he stands charged or the lesser offenses included therein.

Of course, you should not speculate as to the disposition of any charges which may have existed against other persons mentioned during the course of the trial, but you must make your judgment as to the guilt or innocence of Mr. Johnson based solely on the evidence which has been admitted in this case during the conduct of this trial.

In summary then, the State has charged the Defendant in four separate counts, each of which must be proved by the State beyond a reasonable doubt with respect to each element of the crime charged. You will consider each charge separately and independently of
[1006] each other and render a verdict as to each charge regardless of the verdict reached on the other charges.

The fact that you have reached a certain verdict with respect to one charge does not automatically mean you must reach the same verdict as to the other charges. The same tests must be weighed in the case of each charge and should you find a reasonable doubt as to one or more counts, you must give the benefit of the doubt as to that count or counts to the Defendant and find him not guilty on that count or counts.

To recapitulate then, there are four counts on which you must render a verdict. On the first count, charging criminal attempt to commit murder, if you find beyond

a reasonable doubt that the State has proved the Defendant guilty, you shall render a verdict of guilty as charged. If you do not so find, your verdict must be not guilty.

On the second count, charging kidnapping in the second degree, there are three different crimes to consider. First, if you find the Defendant guilty of kidnapping in the second degree beyond a reasonable
[1007] doubt, you stop there and your verdict would be guilty as charged. Second, if you find him guilty of unlawful restraint in the first degree beyond a reasonable doubt, you may stop there. And your verdict will be guilty of unlawful restraint in the first degree. Third, if you find beyond a reasonable doubt that he is guilty of unlawful restraint in the second degree, your verdict will be guilty of unlawful restraint in the second degree.

If, as between any of these crimes, you have a reasonable doubt, you must give the Defendant the benefit of that doubt and find him guilty of the next lesser offense and, of course, if you find him not guilty of any offense, then your verdict will be not guilty.

On the third count, charging robbery in the first degree, there are two different crimes to consider. First, if you find the Defendant guilty of robbery in the first degree, beyond a reasonable doubt, you will stop there and your verdict will be guilty as charged. Second, if you find the Defendant guilty of robbery in the third degree, your verdict will be guilty of robbery in the
[1008] third degree. Again, if as between these two crimes you entertain a reasonable doubt, you must give the Defendant the benefit of that doubt and find him guilty of the lesser included offense and, of course, if you find him not guilty of either offense, your verdict will be not guilty.

On the fourth count which charges sexual assault in the first degree, there are three different crimes to consider. First, if you find beyond a reasonable doubt that the Defendant is guilty of sexual assault in the first

degree, you will stop there and your verdict will be guilty as charged. Second, if you find the Defendant guilty of sexual assault in the third degree, beyond that reasonable doubt, you will stop there and your verdict will be guilty of sexual assault in the third degree. Third, if you find the Defendant guilty of sexual assault in the fourth degree beyond a reasonable doubt, then you will render a verdict of guilty of sexual assault in the fourth degree.

Once more, if, as between any of these crimes, you entertain a reasonable doubt, you will give the Defendant the benefit of that doubt and find him guilty of the
[1009] lesser offense and, of course, if you find him not guilty of any offense, your verdict must be not guilty.

Now, in a few moments the making of decision in this case will be placed in your hands. You will apply to the facts found and determined by you the law given by the Court and render your verdict of guilty or not guilty on each count. That verdict must not be influenced by sympathy. It is almost always true that where one does wrong, not only the wrongdoer but also those near to him must suffer. It is not within your province to determine or be affected in determining your verdict by the effect the verdict may have upon the accused or upon his family.

I should add that you have no concern whatever with the punishment to be inflicted in the event of conviction. That is a matter which is exclusively within the province of the Court under the limitations and restrictions imposed by statute and no responsibility is imposed upon you for that. You are merely to find the facts of guilt or innocence uninfluenced by the probable punishment which might come in the event of conviction.

[1010] In fact, you should not speculate as to the course of events after you have reached a verdict either of guilty or not guilty. Your function is to deliberate on the evidence which has been received in the course of this

trial and solely on that evidence to weigh it in your minds and to come to a decision with respect to each charge as to whether the State has proved the Defendant guilty beyond a reasonable doubt of that charge or of a lesser offense included therein as I have explained them to you.

You must cooly, considerately and with minds unswerved from your duty by any kind of emotion or sentiment determine your verdict from a careful consideration of the facts as disclosed by the evidence and the application of the law thereto. Mr. Johnson justly relies upon you to consider carefully his claims, to consider carefully all the evidence and to find him not guilty if the facts and the law require such a verdict. He rightfully expects fair and just treatment at your hands.

The State of Connecticut and its people, on the other hand, look to you as sworn officers of this court to
[1011] deal with this case fairly, firmly and honestly, as strong-minded men and women, and with the interest placed in your hands as an arm of the court to aid and uphold the law of the land by rendering a verdict of guilty if the facts and the law require such a verdict. The State does not desire the conviction of innocent people or any person whose guilt upon the evidence is in the realm of reasonable doubt. The State is as much concerned in having an innocent person acquitted as in having a guilty person punished.

But for the safety and well-being of society and the protection of life and property, the State is concerned in securing the conviction of persons who have been proven by the evidence to have been guilty of committing a crime beyond a reasonable doubt. It is the sworn duty of Courts and jurors to safeguard the rights of persons charged with crime by respecting the presumption of innocence which the law imputes to every person so charged, but the law is made to protect innocent persons and not to protect guilty ones.

If and when that presumption of innocence has been overcome by evidence proving beyond a reasonable
[1012] doubt that an accused person is guilty of the crime charged, then it is the sworn duty of the jury to enforce the law and to render a verdict of guilty.

Ladies and gentlemen, that concludes my charge. When you retire to the deliberation room, you will elect from among yourselves a forelady or a foreman. Your verdict must be unanimous and, in criminal cases, a verdict is oral. The Information, as I stated, will be in the deliberation room with you and so will all of the exhibits. And I will ask you to retire to the jury room to consider your verdict. However, please do not begin your deliberations until you have received the Information and all of the exhibits. When you have reached your verdict, please knock on the door and there will be a Sheriff who will bring you back into the courtroom.

Now, it becomes obvious at this time, ladies and gentlemen, that the services of our alternates will not be needed. Mr. Bredenberg and Mr. Porter, we are grateful to you, gentlemen, for your attention during the span of this trial which has been a lengthy one and I will now discharge you from service with the gratitude of the
[1013] Court. Thank you very much. Ladies and gentlemen, you may retire to the deliberation room.

* * * * *

[1014] THE COURT: Gentlemen, are their any exceptions to the charge?

MR. SCOTT: If your Honor please, I have a motion to make at this time.

THE COURT: Yes, sir.

MR. SCOTT: I am going to have to move that the charge of sexual assault be dismissed on the ground that the State has failed to prove an essential element of the statute. Public Act 75-619 requires and indicates

that the meaning of this particular statute is limited to persons not married to each other. There has been absolutely no proof in this case that the parties were not married to each other, no matter how ridiculous it may sound it has not been proven by the State.

No mention whatsoever has been made of it. As a result of that essential element, the statute does not apply whatsoever unless that element is proven by the State. It is my recollection that nothing whatsoever was mentioned with respect to whether the two parties were married to each other.

MR. REDWAY: Except that there was evidence, your Honor, to the effect that they had never seen one
[1015] another before. She had never seen any of these individuals before. And I have never heard a wilder claim made in a court of law in the State of Connecticut than I have just heard now. I can't believe that there could be a claim that that element has been lacking with respect to this particular case in light of all of the evidence that has been elicited during the course of the trial.

THE COURT: I will reserve decision on that particular matter, gentlemen. Are there any exceptions to the charge?

MR. REDWAY: The State has none, your Honor.

MR. SCOTT: Other than that claim, your Honor?

THE COURT: Well, your claim for dismissal of the count, but not – you have no exceptions to the charge as such?

MR. SCOTT: No, your Honor. In fact, well – okay.

THE COURT: Very well, gentlemen. You want to examine the exhibits?

MR. SCOTT: I just want to inquire, your Honor indicated, requested whether we were prepared to stipulate to that effect. And I simply wanted the record to show that I am not prepared to stipulate.

STATE OF CONNECTICUT

No. 20875

State of Connecticut — Superior Court

vs. — New Haven County

Lindsay B. Johnson — November 24, 1976

Present, Hon. Ellen B. Burns, Judge

JUDGMENT

The information of Arnold Markle, Attorney to the State of Connecticut, within and for said County, charging Lindsay B. Johnson with the crimes of Criminal Attempt to Commit Murder, Kidnapping, 2nd Degree, Robbery, 1st Degree, and Sexual Assault, 1st Degree, as by information on file will appear, came to the Superior Court holden at New Haven, within and for the County of New Haven in the January, 1976 criminal term of this Court, and thence to January 23, 1976 when the defendant filed a Motion to appoint a Special Public Defender, which Motion the Court (Mulvey, J.) granted on said January 23, 1976 and appointed Herbert Scott, Esquire, Special Public Defender to represent the defendant, and thence to January 27, 1976 when the prisoner appeared before this Court and for plea said Not Guilty to all counts of said information and elected to be tried by a Jury of six, and thence to February 26, 1976 when the Court (Mulvey, J.) granted in part and denied in part the Motion of the defendant filed February 11, 1976 for discovery and inspection, and granted in part and denied in part the Motion of the defendant filed February 11, 1976 for Bill of Particulars, and thence to March 4, 1976 when a Bill of Particulars and a Discovery were filed as ordered by the Court on February 26, 1976, and thence to March 25, 1976 when the Court (Mulvey, J.) denied the Motion of the defendant filed pro se on March 17, 1976 for discharge of case, and when the Court (Mulvey, J.) granted the

Motion of the defendant filed March 18, 1976 for Bond Reduction and reduced the bond to $50,000. and on said March 25, 1976 when the defendant filed a Motion pro se for review by the Supreme Court of the Order of the Superior Court denying the defendant's Motion for discharge, and thence to May 4, 1976 when the Supreme Court (House, J.) granted the Motion for Review, but denied the relief sought therein, and thence to May 12, 1976 when the State filed a supplemental Discovery, and thence to June 30, 1976 when the Court (Santaniello, J.) denied the Motion of the defendant filed June 24, 1976 for Bond Reduction, and thence to September 2, 1976 when the Court (Burns, J.) granted the Motion of the defendant filed on said date for Trial to the Court, and thence to October 1, 1976 when the Court (Burns, J.) granted the Motion filed by the defendant on said date for Jury Trial, and thence to October 12, 1976 when the Court (Burns, J.) denied the Motions of the defendant filed February 11, 1976 to Suppress, and thence to October 19, 1976 when the Court (Burns, J.) denied the Motion of the defendant filed October 15, 1976 to Withdraw as Counsel, and when the Court (Burns, J.) denied the Motion of the defendant filed October 19, 1976 for Mistrial, and thence to November 2, 1976 when all the evidence having been submitted said action was committed to the Jury who returned a verdict of Guilty to all counts of said information, which verdict was accepted and ordered recorded by the Court, and when the Court (Burns, J.) on oral Motion increased the bond from $50,000. to $100,000. and thence to November 5, 1976 when the defendant filed a Motion to set aside said Verdict, and thence to November 23, 1976 when the parties appeared and were heard on said Motion and when the Court denied said Motion, and thence to the present time when the defendant appeared for sentence.

Whereupon it is adjudged that said defendant suffer imprisonment in the Correctional Institution, Somers, on the first count of said information for a term of not less than ten, nor more than twenty years; on the second count of said information said prisoner is to suffer imprisonment in the Correctional Institution, Somers,

for a term of not less than eight, nor more than sixteen years, to run consecutive to the sentence of the first count; on the third count of said information said prisoner is to suffer imprisonment in the Correctional Institution, Somers, for a term of not less than five, nor more than ten years, to run concurrent with the sentence imposed on the second count; and on the fourth count of said information said prisoner suffer imprisonment in the Correctional Institution, Somers, for a term of not less than ten, nor more than twenty years, to run consecutive to the sentences imposed on the first and second counts.

Total effective sentence; not less than twenty-eight, nor more than fifty-six years.

By the Court

Leonard J. Gilhooly
Assistant Clerk

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SUPREME COURT — STATE OF CONNECTICUT
(Title Omitted in Printing)

**DEFENDANT'S APPEAL**

In the above entitled case, the defendant, Lindsay Johnson, appeals to the Supreme Court from the Judgment rendered therein.

The Defendant,
Lindsay Johnson

By Jerrold H. Barnett
Public Defender
His Attorney

Filed December 1, 1976.

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SUPREME COURT — STATE OF CONNECTICUT
(Title Omitted in Printing)

## DEFENDANT'S AMENDED PRELIMINARY STATEMENT OF ISSUES

1. Whether the language of "conclusively presumed intent" in the court's instructions to the jury contravened the principles set forth in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and violated the defendant's constitutional rights?

2. Whether the court erred when its instructions on the crime of kidnapping failed to submit to the jury the option of determining if the abduction of the victim was merely incidental to the commission of another crime?

3. Whether, under the circumstances of this case, the defendant was afforded an adequate opportunity to exercise his constitutional right of self-representation?

Lindsay Johnson,
Defendant-Appellant

By Jerrold H. Barnett
Public Defender
His Attorney

Filed February 5, 1981

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Opinion of the Supreme Court of Connecticut
as reported in 43 Connecticut Law Journal,
No. 5, pp. 5-10 (August 4, 1981)

## SUPREME COURT

June Term, 1981

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STATE OF CONNECTICUT *v.* LINDSAY B. JOHNSON

BOGDANSKI, C. J., SPEZIALE, PETERS, HEALEY and PARSKEY, JS.

Argued June 4—decision released August 4, 1981

Information in four counts charging the defendant with the crimes of attempted murder, kidnapping in the second degree, robbery in the first degree, and sexual assault in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Burns, J.*; verdict and judgment of guilty, and appeal by the defendant to this court. ***Error in part; new trial.***

*Jerrold H. Barnett*, public defender, with whom, on the brief, was *Richard Emanuel*, assistant public defender, for the appellant (defendant).

*Linda K. Lager*, assistant state's attorney, with whom, on the brief, were *Arnold Markle*, state's attorney, and *John T. Redway*, assistant state's attorney, for the appellee (state).

SPEZIALE, J. After a jury trial the defendant was convicted on a four-count information of the crimes of attempted murder, in violation of General Statutes §§ 53a-54a, 53a-49, 53a-8; kidnapping in the second degree, in violation of General Statutes §§ 53a-94, 53a-8; robbery in the first degree, in violation of Public Acts 1975, No. 75-411 §§1 (a) (2), 1 (a) (3) (now General Statutes § 53a-134 (a) (2)

and (3) ); and sexual assault in the first degree, in violation of Public Acts 1975, No. 75-619 § 3 (a) (now General Statutes § 53a-70 (a) ) and General Statutes § 53a-8. The defendant appeals from the judgment rendered upon the verdict, claiming the trial court erred: (1) in its instructions to the jury on the element of intent, (2) in failing to instruct the jury that the abduction of the victim could be found to have been merely incidental to the commission of another crime, and (3) in denying the defendant his right to self-representation. None of these claims was raised at trial.

The jury could reasonably have found the following facts: On December 20, 1975, at approximately 10:30 p.m., the female victim dropped her boyfriend off at the Norwalk railroad station and started to return to her home in West Redding. Unfamiliar with Norwalk, and in cold and snowy weather, the victim lost her way. While still in Norwalk, she stopped her car and asked the occupants of another automobile for directions. The defendant, one of the four men in this automobile, offered to ride in her car to show her the way to route 7. When her car arrived at route 7, the defendant pulled the victim to the passenger side of the car and another man from the second automobile entered the victim's car and drove it away. The victim was told that the men needed a car. She was threatened, at various times, with bodily harm, was shown a knife and was told that there was a gun. Sometime later, while still in Norwalk, the second car was abandoned and its other two occupants entered the victim's car. At another stop, a fifth man was picked up. Eventually, the car was driven on the Connecticut Turnpike toward New Haven. Sometime in the early morning hours of December 21, 1975, the vehicle was stopped near an apartment building in the New Haven area. The victim was forced into the building where she was sexually assaulted by all five men. When the victim was

returned to her car her hands were bound with wire. The car was driven to a bridge on the New Haven-West Haven line where the defendant forced the victim to run across the bridge. At about the midway point, she and the defendant struggled and he threw her over the railing. Initially she landed on a pipe outside of the railing, but jumped into the river and went under the water when the defendant pursued her. She managed to elude him by hiding under the bridge. Sometime later she made her way to a nearby residence from which the police were called. The defendant and others were arrested in Norwalk between 5 and 6 a.m. the same morning in or near the victim's car.

## I

### Intent Instructions

The defendant, relying on *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), claims that the trial court's instructions to the jury on the element of intent, which included the statement that "every person is conclusively presumed to intend the natural and necessary consequences of his act," violated his constitutional rights. On a number of recent occasions this court has considered jury instructions alleged to violate the rule of *Sandstrom*. *State* v. *Stankowski*, Conn. (42 Conn. L.J., No. 46, pp. 5, 14–15) (1981); *State* v. *Brokaw*, Conn. (42 Conn. L.J., No. 31, pp. 9, 11) (1981); *State* v. *Truppi*, Conn. (42 Conn. L.J., No. 25, pp. 1, 2–6) (1980), cert. denied, U.S. , 101 S. Ct. 2024, 68 L. Ed. 2d 329 (1981); *State* v. *Nemeth*, Conn. (42 Conn. L.J., No. 23, pp. 3, 6) (1980); *State* v. *Theriault*, Conn. (42 Conn. L.J., No. 22, pp. 8, 11–13) (1980); *State* v. *Vasquez*, Conn. (42 Conn. L.J., No. 8, pp. 36, 37–40) (1980); *State* v. *Maselli*, Conn. (42 Conn. L.J., No. 7, pp. 15, 18–19) (1980), cert. denied, U.S. , 101 S. Ct. 868, 66 L. Ed. 2d 807 (1981); *State* v. *Perez*, Conn. (41 Conn. L.J., No. 52, pp. 12, 16–17) (1980); *State* v. *Ruth*, Conn. (41 Conn.

L.J., No. 50, pp. 14, 18) (1980); *State* v. *Arroyo,* 180 Conn. 171, 173–82, 429 A.2d 457 (1980); *State* v. *Harrison,* 178 Conn. 689, 693–99, 425 A.2d 111 (1979). This case, however, involves jury instruction language not previously considered by this court.

In the ordinary case we would refuse to review error claimed in jury instructions which, as here, was not brought to the attention of the trial court. Practice Book §§ 315, 3063. We have, however, previously held that because the type of error claimed falls within the "exceptional circumstances" rule of *State* v. *Evans,* 165 Conn. 61, 69–70, 327 A.2d 576 (1973), we will review it despite the lack of objection and exception below. *State* v. *Vasquez,* supra, 37; *State* v. *Maselli,* supra, 18; *State* v. *Perez,* supra, 16; *State* v. *Arroyo,* supra, 173–74.

In *Sandstrom* v. *Montana,* supra, the United States Supreme Court held that a jury instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" violated the defendant's due process rights because a reasonable jury could have interpreted the instruction as a burden-shifting presumption like that invalidated in *Mullaney* v. *Wilbur,* 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), or as a conclusive presumption like those invalidated in *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978) and *Morissette* v. *United States,* 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952). *Sandstrom,* supra, 517–24. The rule of *Sandstrom,* however, must not be oversimplified. *State* v. *Arroyo,* supra, 175. *Sandstrom* does not invalidate, for example, the use of an "entirely permissive inference or presumption, which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant." *Ulster County Court* v. *Allen,* 442 U.S. 140, 157, 99 S. Ct.

2213, 60 L. Ed. 2d 777 (1979); *State* v. *Arroyo*, supra. The use of the word "presume" by itself does not render an instruction invalid under *Sandstrom*. *State* v. *Arroyo*, supra. Rather, it is the "lack of qualifying instructions as to the legal effect of the presumption," making it possible for a reasonable jury to interpret the presumption as conclusive or burden-shifting, which renders the instruction unconstitutional. *Sandstrom*, supra, 517. In a number of cases this court has found no error in instructions containing language similar to that invalidated in *Sandstrom* because the challenged instructions contained other language not present in the *Sandstrom* instructions which was sufficiently precise or elaborate so that the jury would not have applied the instructions in an unconstitutional manner. *State* v. *Stankowski*, supra, 15; *State* v. *Truppi*, supra, 5–6; *State* v. *Nemeth*, supra, 6; *State* v. *Vasquez*, supra, 38–40; *State* v. *Maselli*, supra, 18–19; *State* v. *Perez*, supra, 17; *State* v. *Arroyo*, supra, 179–80.

In examining a jury instruction to determine how a reasonable jury could have interpreted it; *Sandstrom*, supra, 514; we look at the charge as a whole, and will not sever one portion and analyze it in isolation from the rest. *State* v. *Truppi*, supra, 4; *State* v. *Vasquez*, supra, 37; *State* v. *Harrison*, supra, 693. Although general instructions on the state's burden of proof and the defendant's presumed innocence do not by themselves cure an otherwise invalid instruction; *Sandstrom*, supra, 518–19 n.7; *State* v. *Harrison*, supra, 697; general instructions may be considered together with other instructions in determining whether the jury could have interpreted the charge in an impermissible manner. *State* v. *Vasquez*, supra, 39. In evaluating a jury charge to determine whether a *Sandstrom* error has been corrected, the proper consideration is whether the charge, taken as a whole, "clearly delineates the state's burden of proof on every element, including intent" so that "the potential for

confusing the jury is sufficiently reduced." *State* v. *Harrison*, supra, 697.

Prior to instructing the jury regarding the elements of the four crimes with which the defendant was charged and the specific criminal intent required for attempted murder, kidnapping in the second degree, and robbery in the first degree, the trial court provided the jury with a number of general instructions, including a general instruction on intent. It described these instructions as "general comments and principles which form a necessary part of every charge." The jury were told that it was the trial court's duty to state the rules of law applicable to the case and that such statements of law were binding on them. They were also instructed that it was the jury's duty to find the facts and that they were "the sole judges of what the facts are." The jury were instructed on the defendant's presumed innocence, the state's obligation to prove every element of the crimes charged and the state's burden of proving those elements beyond a reasonable doubt. The general instructions contained an explanation of circumstantial evidence and how the jury could draw "reasonable and fair conclusions or inferences" from such evidence. Previously the jury had been told that the evidence that they were to consider included not only the testimony heard and exhibits offered but "any reasonable inferences which you may draw therefrom. You may draw reasonable inferences from the established facts in the case. The inference which you draw, however, must not be from a guess upon the evidence or a surmise upon the evidence, but it must be from a fact which the evidence has established. Inferences that you may draw from these established facts must be logical and reasonable and well-founded upon facts which have been proven in the trial of this case."

In its general instructions, the trial court described intent as "[o]ne of the elements common

to each of the four charges in the information" and promised to "discuss this in more detail as I explain the elements of each offense to you." It went on to state: "The question of intent should cause you no great concern because intent is a question of fact that is solely within your province as jurors. However, you should be aware of a rule of law that will be helpful to you and that is that a person's intention may be inferred from his conduct and every person is *conclusively presumed* to intend the natural and necessary consequences of his act." (Emphasis added.)

The initial question for this court is whether the general instructions, taken as a whole, were erroneous under *Sandstrom*. If the challenged instructions violate the rule of *Sandstrom*, they must do so solely because of the occurrence of the word "conclusively." Had these instructions been cast in terms of a mere presumption rather than a conclusive presumption, the apparent *Sandstrom* violation would have been cured by the remainder of the general instructions. Those other instructions precisely and elaborately delineated the nature of the inferences the jury could draw and the state's burden on each element. They, therefore, would have prevented the jury from interpreting the presumption in an unconstitutional manner. *State* v. *Stankowski*, supra, 15; *State* v. *Truppi*, supra, 5–6; *State* v. *Nemeth*, supra, 6; *State* v. *Vasquez*, supra, 38–40; *State* v. *Maselli*, supra, 18–19; *State* v. *Perez*, supra, 17; *State* v. *Arroyo*, supra, 179–80.

The challenged instruction was cast expressly as a conclusive presumption. While the use of the word "presume" by itself is ambiguous as to whether the presumption is permissive, mandatory, burden-shifting, or conclusive, there can be no serious question as to how the challenged instruction could have been interpreted. Thus, even though the trial court's general instructions, taken as a whole, were precise, elaborate and cast in highly permis-

sive language, it cannot be said those instructions were sufficient to prevent the jury from interpreting the presumption in the way it was expressed to them. The general instructions, therefore, were invalid under *Sandstrom* because they contained an express conclusive presumption. The unconstitutional effect of such a presumption, unless elsewhere cured, would be to deny the defendant a fair trial by requiring or directing the jury to find against the defendant on the element of intent, thus invading the fact-finding function of the jury. *Sandstrom,* supra, 521–23; *United States* v. *United States Gypsum Co.,* 438 U.S. 422, 435, 446, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978).

The conclusion that the trial court's general instructions were erroneous under the rule of *Sandstrom* does not, however, dispose of the defendant's claim of error because it is still necessary to consider the impact of the erroneous general instructions on the specific instructions given on each count. Although the general instructions would normally be incorporated, where applicable, in the court's specific instructions, the actual instructions on each count must be examined to determine whether the *Sandstrom* error in the general instructions was repeated, incorporated, or possibly cured by the specific language used. *State* v. *Truppi,* supra.

A

First Count—Attempted Murder

In its specific instruction on the crime of attempted murder, the trial court properly told the jury that one of the elements of the crime that the state had to prove beyond a reasonable doubt was that the defendant had "the specific intent to commit murder." The jury was told that in considering the question of the defendant's intent "no one can look into a man's mind and see what his intention is. The only way to decide that question is to infer

from the accused's conduct in the light of the surrounding circumstances." At this point, the trial court repeated its erroneous instruction "as previously stated," that "every person is *conclusively presumed* to intend the natural and necessary consequences of his act." (Emphasis added.) While the trial court later somewhat undercut its conclusive language by telling the jury "[i]f you believe [the victim's] version as to the defendant's conduct at the bridge, you *may presume* he intended what would be the natural and necessary consequences of his actions," this language cannot overcome the express conclusive presumption repeated in the instructions on this count. (Emphasis added.) Because the instructions on the first count contained the express language previously found offensive under *Sandstrom,* the defendant's conviction on this count must be reversed.

B

SECOND COUNT—KIDNAPPING

In its specific instruction on the crime of kidnapping in the second degree, the trial court properly explained the element of intent applicable to that crime and told the jury that "a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct." At this point the trial court stated that "I have already instructed you that what a man's intention has been is necessarily very largely a matter of *inference.* Again, no witness can be expected to come here and testify that he looked into another man's mind and saw therein a certain intention. The *only way* in which you can determine in a case such as this what a man's intention was at any given time is by determining what his conduct was and what the circumstances were surrounding that conduct and from those *infer* what his intention was.

"As stated before, to draw such an inference is not only the privilege but also the duty of a juror *provided,* of course, *the inference to draw is a reasonable inference.*" (Emphasis added.)

The trial court's instruction on the second count neither used the offending language of the general instruction nor expressly incorporated it. In fact, these specific instructions were cast solely in properly permissive language. In the absence of the phrase "conclusively presumed," the highly permissive language of this instruction, expressed in terms of inference rather than presumption, had a significant curative effect. *State* v. *Vasquez,* supra, 38; *State* v. *Arroyo,* supra, 178–80. The *Sandstrom* error of the court's general instruction was cured by the specific instruction given by the court. In considering the defendant's guilt on the second count the jury would have applied the permissive inferences described to them in the specific instructions on that count rather than the improper presumption described in general terms earlier. Therefore, there was no error in the trial court's instructions on this count.

C

THIRD COUNT—ROBBERY

In its specific instructions on the crime of robbery in the first degree the trial court properly explained the element of intent applicable to that crime but offered no explanation to the jury on how to ascertain this intent. It did not repeat the offending language of the general instruction or expressly incorporate it. Such repetition or express incorporation would have rendered the specific instructions invalid as indicated in our discussion of the instruction on intent to commit attempted murder. The intent instruction on the third count, robbery, is similar in one respect to the one given on the second count, kidnapping, which we upheld: neither

one repeated or expressly incorporated the erroneous instructions. The general instructions in the two counts differ in that the kidnapping instruction contained highly permissive and ultimately curative language but the robbery instruction contained no such language. In the absence of such additional instructions on the third count, the question for us to decide is whether the robbery instructions implicitly incorporated the erroneous general instructions or retained the curative effect of the intent language contained in the immediately preceding instructions on the second count, kidnapping.

As a practical matter, the curative effect of the preceding instructions would probably be more important in the jury's consideration than the earlier erroneous instruction; however, we cannot assume this to be the case. In *State* v. *Arroyo,* supra, 177–80, for example, this court approved the trial court's instruction on the first count, even though cast in terms of a presumption of intent from consequences, because of additional curative language, but held invalid the same language in instructions on a lesser included offense because of the absence of the additional language. We concluded that "it cannot be assumed that the court's instructions on intent as an element of murder would have been applied to such an extent that the jury unquestionably would have considered them in conjunction with the court's instructions on intent as an element of manslaughter." Id., 181. Similarly, in *State* v. *Truppi,* supra, 5–6, this court upheld one of three counts affected by an erroneous general instruction because of additional curative language in the instructions on that count, but would not assume that this curative language was considered on the other counts where it did not appear. Therefore, because we cannot assume the curative language of the instructions on the second count carried over to the instructions on the third,

we must assume the taint of the erroneous general instructions remained. Because it is reasonably possible that the jury based its conclusion on intent to commit robbery on the erroneous general instructions, the conviction on this count must be reversed.

D

FOURTH COUNT—SEXUAL ASSAULT

The impact of the erroneous general instruction on the defendant's conviction on the charge of sexual assault in the first degree must be analyzed in a much different way than its impact on the first three counts. While each of those counts involved specific intent crimes, sexual assault in the first degree is a general intent crime with no element of specific intent. *State* v. *Truppi*, supra, 3, 3 n.4. The trial court's instruction on this count, therefore, did not mention intent as an element and did not incorporate the erroneous general instructions.[1] Thus, there is no *Sandstrom* error in the conviction on this count. Id.; *State* v. *Perez*, supra, 17.[2]

II

"INCIDENTAL" KIDNAPPING INSTRUCTION

The defendant also claims error in the trial court's failure to instruct the jury on the second count that they could find that the victim's abduction was merely incidental to the commission of another crime and, thus, would not support a conviction of kidnapping in the second degree. The defendant did not request that the trial court give the instruction he now claims was reversible error not to give. Nor did the defendant enter an objection and exception to the instructions given on the ground raised here. This court will not review alleged errors in jury instructions where, as here, no exception was taken in the trial court; Practice Book §§ 315, 3063; *State* v. *Malley*, 167 Conn. 379,

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1 See footnotes, page 70A.

383, 355 A.2d 292 (1974); unless such error is "plain error" which we should consider under § 3063 of the Practice Book or falls within the "exceptional circumstances" rule of *State* v. *Evans,* 165 Conn. 61, 69–70, 327 A.2d 576 (1973). Because of the express language of the kidnapping statute, General Statutes § 53a-94, this court has consistently rejected all attempts to adopt the merger doctrine of *People* v. *Levy,* 15 N.Y.2d 159, 204 N.E.2d 842, cert. denied, 381 U.S. 938, 85 S. Ct. 1770, 14 L. Ed. 2d 701 (1965). *State* v. *Briggs,* 179 Conn. 328, 338–39, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980); *State* v. *Lee,* 177 Conn. 335, 342–44, 417 A.2d 354 (1979); *State* v. *Chetcuti,* 173 Conn. 165, 170, 377 A.2d 263 (1977); *State* v. *Dubina,* 164 Conn. 95, 99–100, 318 A.2d 95 (1972). In Connecticut a defendant may be convicted of second degree kidnapping as well as other felonies arising out of the same incident "as long as the state was able to prove, beyond a reasonable doubt, all of the essential elements of each crime." *State* v. *Briggs,* supra.

Thus the charge which the defendant claims the trial court erred in failing to give is not even an accurate statement of Connecticut law. *State* v. *Chetcuti,* supra, 170–71. The defendant has failed to demonstrate that because the trial court failed to instruct the jury on this issue, he was deprived of a "fundamental constitutional right and a fair trial." *State* v. *Evans,* supra, 70. The error claimed by the defendant is neither plain error nor does it fall within the *Evans* rule. It is, therefore, not reviewable by this court.

## III

### Denial of Right to Self-Representation

Finally, the defendant claims that he was erroneously denied his constitutional right to represent himself as guaranteed by *Faretta* v. *California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)

and the constitution of Connecticut, article first, § 8. This claim arises out of a series of incidents in which the defendant expressed dissatisfaction with his court-appointed counsel. The defendant's expressions became so disruptive that during the trial he had to be removed from the courtroom. At a later point the defendant returned to the courtroom and expressly asked to be allowed to represent himself so that he could call Judge Jon O. Newman to testify about his then-recent decision in *United States* v. *Robinson,* 421 F. Sup. 467 (D. Conn. 1976), rev'd, sub nom. *United States* v. *Newman,* 549 F.2d 240 (2d Cir. 1977) relating to the prosecutorial use of preemptive challenges to jurors on racial grounds. The trial judge in granting the defendant's request to represent himself put his trial counsel on standby status. Practice Book § 961. The defendant was advised, however, that because the prosecution was still presenting its case, no defense witnesses would be called at that time. During this colloquy there was some discussion indicating that the defendant, acting pro se, could not himself subpoena Judge Newman, but the judge left the possibility of calling Judge Newman open if the defendant could express sufficient reason to call him. At this point the defendant became disruptive again and had to be removed from the courtroom. He did not return for the rest of the trial.

Our review of the record reveals that the defendant was not deprived of his right to self-representation by the actions of the trial court. In fact, the trial court scrupulously protected those rights. Indeed, it was the defendant himself, through his disruptive behavior, who forfeited his right to self-representation. Practice Book §§ 892, 965; see *Faretta* v. *California,* supra, 834 n.46.

There is error in part. There is no error and the judgment is affirmed as to the second and fourth counts charging kidnapping in the second degree and sexual assault in the first degree. There is

error as to the first and third counts charging attempted murder and robbery in the first degree; and as to those counts only, the judgment is set aside and a new trial is ordered.

In this opinion the other judges concurred.

---

## FOOTNOTES

1 The defendant maintains that because the general instructions included the statement that intent was "[o]ne of the elements common to each of the four charges," the erroneous instruction did impact on the fourth count and distinguishes this case from *State v. Truppi*, supra; however, this brief and isolated reference by the trial court cannot add an element of specific intent to the crime of sexual assault in the first degree. The trial court may have misspoke or it may have been indicating that one of the lesser included offenses on this count included a form of specific intent as an element. The trial court may also have been referring to the general criminal intent required for virtually all crimes. In any event, its general reference to intent as an element of the fourth charge did not make it so. Id.; see *State v. Perez*, supra, 17.

2 The defendant argues that one of the lesser included offenses on the fourth count, sexual assault in the third degree, includes the element of sexual gratification, a specific criminal intent, which, therefore, incorporated the erroneous general instructions within the specific instructions on the fourth count. We do not need to consider this claim, however, because the trial court's instructions made clear that the jury was not to consider lesser included offenses until they had found the defendant not guilty of the greater offense. Because the defendant was found guilty of the original offense charged, the lesser included offense was not even considered by the jury. A *Sandstrom* error in an instruction not considered by the jury is harmless. *State v. Ruth*, supra, 18.

SUPREME COURT – STATE OF CONNECTICUT
(Title Omitted in Printing)

## MOTION FOR REARGUMENT

Pursuant to Conn. Prac. Book (July 1979) §3111, the State of Connecticut respectfully moves for reargument of the above-captioned case, to the extent error was found and a new trial ordered on the first and third counts, for the following reasons:

1. The State respectfully requests this Court to reconsider its conclusion that the general instructions were invalid under *Sandstrom v. Montana*, 442 U.S. 510 (1980), solely because the court used the word "conclusively." *State v. Johnson*, Conn. (43 Conn. L.J. No. 5, pp. 5, 7) (Aug. 4, 1981). This Court has found "the trial court's general instructions, taken as a whole, [to be] precise, elaborate and cast in highly permissive language" and the "instructions precisely and elaborately delineated the nature of the inferences the jury could draw and the state's burden on each element." *Id.* The State respectfully submits that the trial court's overall presentation was rhetorically inconsistent with a conclusive presumption and sufficiently contradicted the single use of the words "conclusively presumed" in the general instructions and requests this Court to reconsider this point.

2. The State respectfully requests this Court to rule on the issue of harmless error with respect to the two counts this Court has found offensive under *Sandstrom*. The applicability of harmless error analysis in this case was addressed in both the Defendant's Brief, at pages 38-39, and the State's Brief, at pages 30-31, and in oral argument, but was not discussed in this Court's opinion. The State may wish to seek further review of this issue and submits that the United States Supreme Court has left the door open to harmless error analysis in *Sandstrom*-type cases. *Sandstrom v. Montana*, 442 U.S. at 526-27.

THE STATE OF CONNECTICUT

By /s/ Linda K. Lager
Assistant State's Attorney

(Certificate of Service omitted in printing).

SUPREME COURT — STATE OF CONNECTICUT
(Title Omitted in Printing)

**ORDER**

The State's Motion for Reargument and the Defendant's Motion for Reargument

Having been presented to the Court, they are hereby ORDERED DENIED.

BY THE COURT

/s/ Donald H. Dowling
CHIEF CLERK

**Notice**
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Ernest J. Diette, Jr.,
Assistant State's Attorney
Linda K. Lager, Assistant
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Jerrold H. Barnett,
Public Defender
Clerk, Superior Court, New Haven
September 17, 1981

Received September 21, 1981

# Opposition

Office - Supreme Court, U.S.
FILED
DEC 14 1981
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1981

---

NO. 81-927

---

STATE OF CONNECTICUT
Cross-Petitioner

V.

LINDSAY B. JOHNSON
Cross-Respondent

---

# BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

---

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## QUESTION PRESENTED

When a jury in a state criminal trial is erroneously instructed on a "rule of law" that "every person is conclusively presumed to intend the natural and necessary consequences of his act", may an appellate court determine whether the error was harmful or harmless from the content of the entire charge or is the court constitutionally required to consider the weight of the prosecution's evidence?

## PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceedings.

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## STATEMENT OF THE CASE

After a jury trial, Cross-Respondent was found guilty on all counts of a four count information in which he was charged with the crimes of attempted murder, kidnapping in the second degree, robbery in the first degree and sexual assault in the first degree. On appeal to the Connecticut Supreme Court, Cross-Respondent claimed that the jury instructions at his trial violated due process principles as enunciated [subsequently] in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

The Connecticut Supreme Court agreed, in part, with Cross-Respondent's contention. The convictions of attempted murder and robbery in the first degree were vacated and new trials were ordered on these counts. The convictions of kidnapping in the second degree and sexual assault in the first degree were affirmed although for different reasons.

In the opinion of the Connecticut Supreme Court, the instruction on intent as an element of the crime of kidnapping was considered to have been sufficiently insulated from the wrongful portions of the charge whereby the jury was told twice of a "rule of law" that "every person is conclusively presumed to intend the natural and necessary consequences of his act." Appendix to Cross-Petitioner's brief, pp. 6A-10A. Whether, the state Court erred in this aspect of its decision was the subject of Cross-Respondent's own petition to this Court. Johnson v. Connecticut, No. 81-5560, cert. denied December 7, 1981.

The Connecticut Supreme Court, with a reference to its recent decision in State v. Truppi, 42 Conn. L.J. No. 25 pp. 1, 3 and

n. 4 (1980) cert. denied ___ U.S. ___, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981), also decided that Cross-Respondent's claim of error did not reach the sexual assault charge because state law did not require proof of a specific state of mind for a conviction of that crime. No further review of the sexual assault conviction was sought from this court.

Cross-Petitioner did not oppose Cross-Respondent's own petition where the question was whether the conclusive presumption of intent, as stated in the jury instructions, was an error which required that the conviction for kidnapping be set aside as were the convictions for attempted murder and robbery. The cross-petition admits the constitutional defect but contends that the Connecticut Supreme Court failed to test the significance of that defect by application of the harmless error doctrine.

In actuality, however, Cross-Petitioner's contention is of considerably narrower scope. It amounts to no more than a claim that, as a matter of constitutional law, the State Supreme Court should have determined the effect of the wrongful instruction from the evidence introduced at the trial. Apparent from the decision below is that the Connecticut Supreme Court considered the possibilities of harmful or harmless error from its assessment of the language in the instructions. E.g. appendix to Cross-Petitioner's brief pp. 10A-12A. The reasons given by the Connecticut Supreme Court for its declination to "weigh evidence" in cases of this nature are set forth in the following excerpt from its opinion in State v. Truppi, supra at 7:

> "Since the defendant's jury reasonably could have relied on a 'no evidence' standard in determining intent for kidnapping and robbery they may reasonably have failed to consider the evidence, which the state urges us to find overwhelm-

> ing. That possibility is incompatible with both the societal interest in the reliability of these jury verdicts; see Mullaney v. Wilbur, 421 U.S. 684, 699, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); and the protection which a jury determination of guilt by the 'beyond a reasonable doubt' standard should guarantee to the defendant. Therefore, we decline to weigh the evidence of guilt against the uncured damage done by the harmful portion of the instructions. To do otherwise would transfer to this court the jury's function of measuring the evidence by appropriate legal yardsticks. Bollenbach v. United States, 326 U.S. 607, 614, 66 S.Ct. 402, 90 L.Ed. 350 (1946). Therefore, we reverse the convictions for robbery and kidnapping."

Also in Truppi, supra, n. 12, the Connecticut Supreme Court acknowledged that other courts had used the "weighing of the evidence" test which Cross-Petitioner advocates. E.g. People v. Wright, 408 Mich. 1, 289 N.W.2d 1, 11 (1980); State v. McKenzie (Mont. 1980), 608 P.2d 428, 458 cert. denied ___ U.S. ___, 101 S.Ct. 626, 66 L.Ed.2d 507 (1980).

## REASONS FOR DENYING THE CROSS-PETITION

The cross-petition fails to present a constitutional question for at least two discrete reasons.

### 1.

### BECAUSE THE JURY INSTRUCTIONS STATED THE PRESUMPTION OF INTENT AS A CONCLUSIVE ONE, THE QUANTUM OF EVIDENCE AGAINST CROSS-RESPONDENT WAS IRRELEVANT

The Connecticut Supreme Court noted that Cross-Respondent's case differed from its other post-Sandstrom decisions because, in this case, the jury instruction stated expressly that the presumption of intent was a conclusive one and there could be no serious question as to how the jury could have interpreted it. Appendix to Cross-Petitioner's brief pp. 3A-4A, 7A. In view of the

language used, the State Supreme Court could hardly have ruled otherwise.

In the so-called general instructions which preceded the explanation of the elements of the various crimes, the trial judge said:

> "In this case, as in all cases, you as the jury and I as the Court have separate functions. It is my duty to state the rules of law involved in the decision of the case and it is your duty to find the facts. And in this respect, you are the sole judges of what the facts are. Insofar as I state the law to you, what I say is binding upon you, and it is your duty to follow such instructions.
>
> "If, by chance, you have a different idea of what the law is, perhaps what it should be, you must disregard your notions and conscientiously apply the law as I state it to you. In addition, if the law, as I give it to you, differs in any way from the claims made by counsel in argument, then you will dismiss from your minds what they have said to you about the law which is contrary to what I tell you that it is.
>
> "Thus, the performance of my duty requires that I state the rules of law lying at the foundation of the various contentions of the Defendant and the State, and the rules which, when applied to the facts that you find, will lead to your ultimate verdict of guilt or innocence." (Transcript pp. 954-955)

At a subsequent point in the general instructions, the concept of criminal intent was introduced by the following language:

> "One of the elements common to each of the four charges in the Information is intent. And I will discuss this in more detail as I explain the elements of each offense to you.
>
> "However, the question of intent should cause you no great concern because intent is a question of fact that is solely within your province as jurors. However, you should be aware of a rule of law that will be helpful to you and that is that a person's intention may be inferred form his conduct and

> every person is conclusively presumed to intend the natural and necessary consequences of his act." (Transcript p. 969)

And, the conclusive nature of the presumption of intent from act was reiterated during the explanation of the elements of attempted murder, the crime charged by the first count of the information.

> "Now, no one can look into a man's mind and see what his intention is. The only way to decide the question is to infer from the accused's conduct in the light of the surrounding circumstances. But as previously stated, every person is conclusively presumed to intend the natural consequences of his act." (Transcript p. 973)

A number of decisions have been cited by Cross-Petitioner to support its contention that the Connecticut Supreme Court erred when it adjudged the harmfulness of the foregoing instructions only from the remaining portions of the charge. These decisions apply an "overwhelming evidence" of guilt standard to errors in jury instructions of the type condemned by Sandstrom v. Montana, supra. In none of Cross-Petitioner's cases, however, do the jury instructions definitively establish a conclusive presumption of intent from act. E.g. Baker v. Mincey (4th Cir. 1980), 619 F.2d 327, 330, State v. McKenzie, supra at 456-457; People v. Wright, supra at 5.

In Sandstrom, itself, the instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" was found to be ambiguous. This Court decided that reasonable jurors could have interpreted it as either conclusive or burden shifting. 442 U.S. at 517, 99 S.Ct. at 2456.

From the language of the instruction given at Cross-Respondent's trial, however, no doubt exists as to the nature

of the presumption. The presumption was a conclusive one which effectively eliminated intent as an element of the charged offenses. United States v. United States Gypsum Co., 438 U.S. 422, 446, 98 S.Ct. 2864, 2878, 57 L.Ed.2d 854 (1978); Morissette v. United States, 342 U.S. 246, 27[f], 72 S.Ct. 240, 256, 96 L.Ed. 288 (1952).

It is the conclusiveness of the presumption, here, which makes Cross-Petitioner's claim untenable. The presumption affected several due process rights in a manner which no amount of evidence could render harmless. The following quotation from this Court's analysis of the presumption in Sandstrom as a conclusive one should effectively dispose of Cross-Petitioner's claim:

> "As in Morissette and United States Gypsum Co., a conclusive presumption in this case would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime and would invade the fact-finding function which in a criminal case the law assigns to the jury." 442 U.S. at 523, 99 S.Ct. at 2459.

2.

CONSTITUTIONAL LAW DOES NOT REQUIRE A STATE COURT TO ADOPT A STANDARD WHICH IS LOWER THAN THE ONE WHICH THIS COURT HAS CHOSEN FOR ITSELF

As shown by the quotation from State v. Truppi, ante at 2-3, the decision in Bollenbach v. United States, 326 U.S. 607, 66 S. Ct. 402, 90 L.Ed. 350 (1946) was an impetus for the rule adopted by the Connecticut Supreme Court. Therefore, at this juncture, it seems appropriate to request the response which this Court gave, in Bollenbach, to the prosecution's assertion that an erroneous jury instruction on presumed knowledge had been made harmless

by the evidence in the case.

> "In view of the Government's insistence that there is abundant evidence to convict the defendant, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but, whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." 326 U.S. at 614, 66 S.Ct. at 406.

Perhaps Cross-Petitioner is correct in the suggestion that the holding of Bollenbach has been undermined by Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) so that now there is a lower constitutional standard. In State v. McKenzie, supra at 457-458, the Supreme Court of Montana expressed such a view and held that a rebuttable [and non-conclusive] presumption of intent in a jury instruction was constitutional error which could be considered as harmless beyond a reasonable doubt when evidence of guilt was overwhelming.

But, constitutional standards are bedrock ones. McNabb v. United States, 318 U.S. 332, 340, 63 S.Ct. 608, 613, 87 L.Ed. 819 (1943). When the Connecticut Supreme Court decided State v. Truppi, supra [and Cross-Respondent's case] it was faced with a choice of law. See McKenzie v. Montana, ___ U.S. ___, 101 S. Ct. 626, 628 n. 2, 66 L.Ed.2d 507 (1980) (Marshall and Brennan JJ. dissenting from denial of certiorari). The State Supreme Court certainly cannot be faulted for its selection of a rule that accords with a supervisory decision of this Court. See McNabb v. United States, supra.

## CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari to the Connecticut Supreme Court should be denied.

Respectfully submitted,

JERROLD H. BARNETT
Public Defender

RICHARD EMANUEL
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DEC 14 1981
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SUPREME COURT, U.S.

STATE OF CONNECTICUT,
Cross-Petitioner

VS.

LINDSAY B. JOHNSON,
Cross-Respondent

NO. 81-927

IN THE SUPREME COURT

OF THE UNITED STATES

DECEMBER 10, 1981

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, the petitioner, Lindsay B. Johnson, respectfully moves for leave to proceed in forma pauperis on the cross-petition of the State of Connecticut.

At all stages of the state trial and appellate proceedings and on his petition to this Court, Johnson v. Connecticut, No. 81-5560, cert. denied December 7, 1981, the cross-respondent has been represented by an attorney or attorneys provided to him without cost by the State of Connecticut. Cross-respondent has not submitted an affidavit in support of his motion for the reason that the affidavit which he signed on October 9, 1981, and filed with his own petition is still valid in all particulars.

LINDSAY B. JOHNSON
Cross-Respondent

BY Jerrold H. Barnett

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SUPREME COURT OF THE UNITED STATES

NO. 81-927

STATE OF CONNECTICUT, Cross-Petitioner VS. LINDSAY B. JOHNSON, Cross-Respondent

CERTIFICATION

I hereby certify that the foregoing Motion has been mailed to Attorney Linda K. Lager, Assistant State's Attorney, 235 Church Street, New Haven, CT 06510, counsel for the Cross-Petitioner, on December 10, 1981.

Jerrold H. Barnett

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# Petitioner's Brief

Supreme Court, U.S.
FILED
APR 21 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-927

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1981

**STATE OF CONNECTICUT**
*Petitioner*

v.

**LINDSAY B. JOHNSON,**
*Respondent*

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

In a state criminal case where error under *Sandstrom v. Montana*, 442 U.S. 510 (1979), was found despite general instructions that precisely and elaborately explained the nature of the inferences the jury could draw and the state's burden of proof in highly permissive language and specific instructions on the elements of each crime, should the error have been analyzed for harmlessness under *Chapman v. California*, 386 U.S. 18 (1967), and, if so, was the error harmless beyond a reasonable doubt in this case.

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R. Charrow & V. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L.Rev. 1307 (1979) .. 29

Field, *Assessing The Harmlessness of Federal Constitutional Error — A Process In Need of a Rationale*, 125 U.Pa. L.Rev. 15 (1976) ..... 28

James & Hazard, *Civil Procedure* (2nd ed. 1977) ..... 34

Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen*, 94 Harv. L.Rev. 1574 (1981) ..... 30

Saltzburg, *The Harm of Harmless Error*, 59 Va. L.Rev. 998 (1973) ..... 28

Schmolesky, *County Court of Ulster County v. Allen* and *Sandstrom v. Montana: The Supreme Court Lends An Ear But Turns Its Face*, 33 Rutgers L.Rev. 261 (1981) ..... 20

R. Traynor, *The Riddle of Harmless Error* (1970) .. 20, 28

Note, *Harmless Constitutional Error: A Reappraisal*, 83 Harv. L.Rev. 814 (1970) ..... 28

Note, *Presumptive Intent Jury Instructions After Sandstrom*, 1980 Wis. L.Rev. 366 (1980) ..... 20

## CITATION TO THE OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the Connecticut Supreme Court has not yet been printed in the Connecticut Reports, but is officially reported in the Connecticut Law Journal, volume 43, no. 5, p. 5 (Aug. 4, 1981) and is printed in the appendix. (J.A. 56A-70A). No opinion was written by the Connecticut Supreme Court regarding the petitioner's Motion to Reargue, but its summary order denying that motion is printed in the appendix (J.A. 73A). There was no written opinion of the trial court. An unofficial report of the proceedings is not yet available.

## STATEMENT OF THE GROUNDS OF JURISDICTION

The judgment of the Connecticut Supreme Court was released on August 4, 1981. The state filed a timely motion to reargue, which was denied by the Connecticut Supreme Court on September 16, 1981. The state's petition for writ of certiorari was filed on November 16, 1981 and granted on February 22, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

any person within its jurisdiction the equal protection of the laws.

Title 28 of the United States Code, §1257(3) provides:

> Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, . . .where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Section 53a-49(a) of the Connecticut General Statutes, entitled "Criminal attempt" provides:

> A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Section 53a-3 of the Connecticut General Statutes, entitled "Definitions" provides:

> (11) A person acts "intentionally" with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct;

Section 53a-54a of the Connecticut General Statutes, entitled "Murder defined" provides:

> A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception.

Section 53a-134(a) of the Connecticut General Statutes, entitled "Robbery in the first degree" provides:

> A person is guilty of robbery in the first degree when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime: (1) Causes serious physical injury to any person who is not a participant in the crime; or ... (3) uses or threatens the use of a dangerous instrument ....

Section 53a-133 of the Connecticut General Statutes, entitled "Robbery defined" provides:

> A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

Section 53a-119 of the Connecticut General Statutes, entitled "Larceny defined" provides:

> A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner.

Section 53a-8 of the Connecticut General Statutes, entitled "Criminal liability for acts of another" provides:

> A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

## STATEMENT OF THE CASE

After a jury trial, the respondent was found guilty on a four-count criminal information charging him with attempted murder, kidnapping in the second degree, robbery in the first degree, and sexual assault in the first degree. Upon the respondent's appeal to the Connecticut Supreme Court, error was found in the jury instructions pertinent to the attempted murder and robbery counts, those convictions were set aside and a new trial on those counts was ordered.

The Connecticut Supreme Court sustained the respondent's convictions of the sexual assault and kidnapping charges. The respondent sought review of the latter conviction by petition for writ of certiorari filed with this Court on October 13, 1981, which was denied on December 7, 1981. On or about March 1, 1982, the respondent filed a motion for leave to file a petition for rehearing, which this Court denied on March 29, 1982.

In this action, the state seeks review of the Connecticut Supreme Court's decision reversing the respondent's convictions on the attempted murder and first degree robbery charges because the trial court's jury instructions were found unconstitutional. The following facts are pertinent to this Court's consideration of the state's claim of harmless error.

### A. The Offense

At approximately 11:00 p.m. on December 20, 1975, the victim lost her way in Norwalk, Connecticut and sought directions from the occupants of another automobile. She accepted the offer of the respondent Johnson to ride with her in her car to show her the way because he told her the route was difficult to find. (R.T.

20-29, 255, 258, 261).[1] When they arrived at a route familiar to the victim, Johnson grabbed her around the neck and pulled her towards the passenger side of the car. Meanwhile, another man from Johnson's original vehicle got in and took control of the victim's automobile. The victim was told that the men needed a car and that she was going to come with them. Johnson told the other man to "show her the gun," but the victim asked them not to display it and she did not see a gun at that time. (R.T. 28-33, 37, 39, 270, 275-277, 280, 290).

Shortly after taking control of the victim's car, the original vehicle was abandoned by Johnson's two other companions who joined the men in the victim's car. One of the new arrivals had a knife, which he displayed, and the others spoke about how well he used it. Later, the men stopped to pick up a fifth companion.[2] They made a final stop and the victim observed one of the men place in the trunk, after Johnson had gotten the trunk key from her, a flat, triangular-shaped object wrapped in a blanket, which was subsequently discovered to be a fully loaded semi-automatic rifle. (R.T. 41-49, 57-59, R.T. 10/22/76, 12-14).

The five men then proceeded to drive the victim to the New Haven, Connecticut area. During the trip, the victim was seated in the front passenger seat and was restrained by Johnson, who boasted about his physical strength and ability to fight. Throughout the trip, Johnson and the others threatened the victim with physical harm, called her "bitch," and told her not to move or speak. Johnson made comments to the victim about

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[1]The reference R.T. denotes pages in four volumes of consecutively numbered trial transcript. The reference R.T. 10/22/76 denotes pages from a separate volume of trial transcript. All five volumes should be included in the certified record submitted to this Court.

[2]The state's criminal information charged the respondent as acting in concert with his four companions, William E. Martin, Clinton Martin, Charles E. Spencer, and Carlton Bailey. (J.A. 1A-2A). The victim positively identified all five men. (R.T. 200-203, 209-213).

never having "had a white woman before." (R.T. 45, 49-52, 56, 62, 64, 66, 295).

When they arrived in the New Haven area, Johnson directed the driver to a large apartment complex after making a brief stop at a gas station. Johnson pulled the victim out of her car and into the building. There, Johnson grabbed her and choked her, saying "they were going to get a piece of pussy." The victim was then sexually assaulted by all five men. (R.T. 64-79, 311, 314-316, 323-327).

Ultimately, the victim was placed back into her car. Johnson bound her hands at the wrists with what appeared to be telephone wire and ordered one of the others to bind her feet; however, he was unable to do so. Johnson told the victim they were going to leave her with a dime near a telephone booth, but they needed time to make their get-away with her car. With Johnson again giving the driver directions, they drove to a secluded area near a bridge and stopped. Johnson pulled the victim out of the car and, holding her, forced her to run across the bridge. In the middle of the bridge, Johnson pulled her to a stop, they struggled and he threw her over the bridge, yelling and calling her a "bitch." The victim landed on a large pipe, but jumped into the river and went under water when Johnson pursued her. She managed to evade Johnson by hiding under the bridge, loosened her bonds, and tried to remain hidden because she heard shouting, but she eventually sought shelter from the cold. (R.T. 80-92, 328-332, 376-380, 390-392).

For the period between midnight and 4:30 a.m. on December 21, 1975, the United States National Weather Service in Bridgeport, Connecticut computed a wind-chill factor of ten degrees below zero. Approximately four inches of snow had accumulated from snowfall that began on December 20, 1975. (R.T. 10/22/76, 34-39).

At approximately 4:00 - 4:30 a.m. on December 21, 1975, the victim was provided shelter at a nearby

residence, after the occupants heard someone moaning, "Please let me in . . . they were trying to kill me." They found that the victim was soaking wet, shaking, cold and breathless. (R.T. 370-394). The police were called and after questioning the victim, they learned the marker number and description of her car and that five black men had been involved in the incident, which began in Norwalk, Connecticut. This information led to the apprehension in Norwalk, at approximately 5:00 - 6:00 a.m., of Johnson and the others while they were in or near the victim's vehicle.[3] (R.T. 381, 417, 421-422, 428, 632-648, 690).

Two days after the offense, the victim was shown fifteen photographs of black males displayed on a piece of cardboard. She positively identified all five perpetrators. (R.T. 199-203, 209-213). She also made an independent, in-court identification of Johnson, who she described as the most vicious and violent of the five men and the one who took the most active role during her five-hour ordeal. The victim testified that she remembered Johnson vividly. (R.T. 92-93, 193-198).

**B. The Trial**

Johnson's trial, before the Honorable Ellen B. Burns and a jury, started on October 12, 1976. Previously, the other four men named in the criminal information had pleaded guilty to various charges. As the trial transcript

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[3]At the scene of the arrest, the Norwalk police took a hunting knife and sheath from William E. Martin and a carpet or linoleum cutting knife from Clinton Martin. Two other knives were found in the car's rear seat floor area. One officer at the scene testified he saw someone other than Johnson throw an object which he heard hit a nearby fence. About forty-five minutes later, the officers found a small loaded handgun and holster in that vicinity. A loaded rifle was found in the trunk of the car, which was opened at the Norwalk police station. Both weapons were operable. A butter knife belonging to the victim was taken from Johnson's pocket at the police station. (R.T. 640-641, 646-647, 654-656, 673-677, 682, 688, 696-699, 717, R.T. 10/22/76, 14, 18-19, 47, 50-52, 56).

reveals, the bulk of the evidence presented at trial came from the state's witness - the victim, the people who sheltered her, police officers, and various expert witnesses. The four other perpetrators who were named in the information did not testify at Johnson's trial. (R.T. 1049). The only witness called by the defense was a New Haven Police Department detective whose testimony has no bearing on the issues raised in this case. (R.T. 934-939). The defendant did not testify.

The defense strategy focused on attacking the credibility of the state's witnesses, particularly that of the victim. Cross-examination of the victim covers almost one hundred pages of trial transcript. (R.T. 248-343). The defense tried to establish that the victim invited Johnson into her car, that she went along voluntarily, and that she made sexual overtures to the respondent. The victim agreed that she accepted Johnson's offer to show her the way, but denied going along voluntarily and denied making any sexual advances. The defense also emphasized that the men offered to give the victim some money. (R.T. 258-261, 264-265, 274, 276, 292-293, 321, 323).

### C. The Jury Instructions

The trial court gave extensive, unexcepted-to, instructions. (R.T. 954-1015, J.A. 13A-50A). Before instructing the jury about the specific elements of the four crimes charged, the court provided a number of general instructions. The court began by explaining the separate functions of the court and jury. The jury were told that the court's duty was to state the rules of law and that such statements were binding on them. The jury were also told that they were the sole judges of the facts which they were to determine by considering all the evidence and exhibits and drawing reasonable inferences. (R.T. 955-956, J.A. 14A-15A). The court cautioned the jury that the "inferences which you draw, however, must not be from a guess upon the evidence or a surmise upon the evidence, but it must be from a fact

which the evidence has established. Inferences that you may draw from the established facts must be logical and reasonable and well-founded upon the facts which have been proven in the trial of this case." (R.T. 958, J.A. 16A). The general instructions also contained an explanation of circumstantial evidence and how the jury could draw "reasonable and fair conclusions or inferences" from such evidence. (R.T. 967-968, J.A. 22A).

The court repeatedly stressed that the jury were to resolve all questions of fact by careful consideration of all the evidence and "solely upon the evidence giving to each part of the evidence the weight you consider it deserves in reaching the ultimate conclusion of guilt or innocence." They were told they could approve or disapprove the court's comments concerning the weight of the evidence or the propriety of finding certain facts, and were not to feel obliged to give any particular weight to evidence to which the court referred. (R.T. 955-956, J.A. 14A-15A).

In describing the presumption of innocence, the court delineated the state's burden of proof, stating, *inter alia*,

> The accused person does not have to prove that he did not commit the offenses with which he is charged. The State must prove that he did.
>
> The burden then is on the State to prove the accused guilty with respect to each of the crimes with which he is charged and he does not have to prove his innocence. He may remain silent.
>
> . . . .
>
> The State, again, must prove every element necessary to constitute each of the crimes as charged as I shall explain them to you in a moment and it is not enough for the State to prove certain of those elements. Because if

> proof of even one of them is lacking, you would have to find the accused not guilty of that crime.
>
> The State, in other words, can sustain the burden resting on it only if the evidence before you establishes the existence of every element constituting the crime charged beyond a reasonable doubt.
>
> (R.T. 959-960, J.A. 16A-17A).

Of course, the court fully instructed the jury on the concept of reasonable doubt (R.T. 961-962, J.A. 18A) and later reiterated that the state bore the burden of proving the element of intent beyond a reasonable doubt. (R.T. 972, 974, 981, 985, 990, 1005-1009, 1010, J.A. 24A, 25A, 30A, 32A, 35A, 44A-46A, 47A).

In its general instructions, the court described intent as "[o]ne of the elements common to each of the four charges in the information" and indicated it would "discuss this in more detail" when it instructed on the elements of each offense. Immediately thereafter, the court instructed as follows:

> However, the question of intent should cause you no great concern because intent is a question of fact that is solely within your province as jurors. However, you should be aware of a rule of law that will be helpful to you and that is that a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act.
>
> (R.T. 969, J.A. 22A).

The court followed this instruction with an explanation of both consciousness of guilt and motive evidence, and their bearing on the factual issue of intent. (R.T. 969-971, J.A. 22A-24A).

The court then proceeded to instruct the jury about the specific crimes charged in the information. On the first count of criminal attempt to commit murder, the court read the accusation in the information and the applicable statutory language. (R.T. 971-972, J.A. 24A-25A). The court then gave the following instruction:

> The first element then which the State must prove beyond a reasonable doubt to sustain a conviction of the accused on this charge is that he has the specific intent to commit murder. And this requires that the crime of murder be explained to you.
>
> A person commits a murder when, with intent to cause the death of another person, he causes the death of such person. Therefore, on this phase of the case, the first question you must ask is this: What intention did the Defendant have in mind? Did he alone or participating with others intend to commit the crime of murder? Did he alone or participating with others intend to cause the death of [the victim]?
>
> Now, no one can look into a man's mind and see what his intention is. The only way to decide that question is to infer from the accused's conduct in the light of the surrounding circumstances. But as previously stated, every person is conclusively presumed to intend the natural and necessary consequences of his act.
>
> The State has offered evidence concerning a Defendant's conduct towards [the victim] at the bridge and suggests that by his actions he intended to murder her. Of course, you as jurors may believe or disbelieve all or any part of [the victim's] testimony in this regard as you deem proper. If you believe her version as to the Defendant's conduct at the bridge, you

may presume he intended what would be the natural and necessary consequences of his actions, under the prevailing circumstances and conditions; for example, the temperature of air and water and the force used against her person.

If, upon all the evidence, you conclude beyond a reasonable doubt that the Defendant had formed in his mind the intention to cause the death of [the victim], your next question is whether he intentionally did or omitted to do anything which, under the circumstances, as he believed them to be, was an act or omission constituting a substantial step in a course of conduct planned to culminate in her death. And a person acts intentionally with respect to a result or to conduct when his conscious objective is to cause such result or to engage in such conduct.

You have heard the evidence concerning the Defendant's conduct on the night in question. It is for you to determine on the evidence whether the State has proved beyond a reasonable doubt first that Mr. Johnson intended to cause the death of [the victim], and second was that with that intent he intentionally did anything which, under the circumstances as he believed them to be, was an act constituting a substantial step in a course of conduct planned to culminate in her death.

If you find that the State has proved each of these elements beyond a reasonable doubt, you must find the Defendant guilty of criminal attempt to commit murder. If you do not find the State has proved each of these elements beyond a reasonable doubt, then you must find him not guilty on this first count.

(R.T. 972-975, J.A. 24A-26A).

The second count of the information charged second degree kidnapping, another specific intent crime. After reading the information and applicable statute, the court charged on the element of intent this way:

> In this last definition I read to you, the word "intentionally" appears and again I charge you that a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. I have already instructed you that what a man's intention has been is necessarily very largely a matter of inference. Again, no witness can be expected to come here and testify that he looked into another man's mind and saw therein a certain intention. The only way in which you can determine in a case such as this what a man's intention was at any given time is by determining what his conduct was and what the circumstances were surrounding that conduct and from those infer what his intention was.
>
> As stated before, to draw such an inference is not only the privilege but also the duty of a juror provided, of course, the inference to draw is a reasonable inference.

(R.T. 978, J.A. 28A).

On the third count of first degree robbery, the court again read from the information and the applicable statutes. While the court neither gave explicit instructions on how to determine intent nor referred to its earlier intent instructions, it gave extensive explanatory instructions on the meaning of the requisite intent to deprive or appropriate property. (R.T. 988-992, J.A. 34A-36A). The court also gave an unobjected-to and never challenged charge that "you may infer from possession of property recently stolen if unexplained or standing

alone or without other facts pointing to a contrary conclusion, that the possessor stole the property." (R.T. 992, J.A. 36A-37A).

The charge concluded with instructions on the fourth offense charged, first degree sexual assault, and the concept of accessorial liability. (R.T. 998-1005, J.A. 39A-44A). Finally, the court reiterated the state's burden of proof and the jury's obligation to reach a verdict solely on the evidence. (R.T. 1005-1010, J.A. 44A-47A). At the close of the charge, the defense took no exception. (R.T. 1014, J.A. 48A-49A).[4]

**D. The Conviction and the Appeal**

On November 2, 1976, the jury returned verdicts of guilty to all counts of the information. (J.A. 51A-53A). On November 24, 1976, Judge Burns sentenced Johnson as follows: on the attempted murder count to a term of not less than ten nor more than twenty years, on the kidnapping count to a term of not less than eight nor more than sixteen years consecutive to the first count sentence, on the robbery count to a concurrent term of not less than five nor more than ten years, and on the sexual assault count to a term of not less than ten nor more than twenty years consecutive to the sentences on the first and second counts. The total effective sentence was not less than twenty-eight nor more than fifty-six years. (J.A. 51A-53A).

A timely appeal was filed on Johnson's behalf on December 1, 1976. (J.A. 54A). Due to problems associated with transcription, the appeal was not perfected by the filing of appellant's brief until February, 1981. The state's brief was filed in March, 1981 and argument was

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[4]At the jury's requests, supplementary instructions were given on the crimes of kidnapping in the second degree, sexual assault in the first degree and their respective lesser offenses. These instructions were simply a rereading of the original instructions, thus they are not included in the joint appendix. (R.T. 1026-1037, 1039-1045).

had on June 4, 1981. On August 4, 1981, the Connecticut Supreme Court issued its opinion reversing the convictions on the attempted murder and robbery counts and ordering a new trial of those charges. Although it found that the trial court's general instructions "precisely and elaborately delineated the nature of the inferences the jury could draw and the state's burden on each element," it further found that these "precise, elaborate ... and highly permissive" instructions did not overcome the language of the trial court's general intent instruction. (J.A. 62A-63A). The Connecticut Supreme Court further examined the specific instructions given on each count. It found that the kidnapping instructions cured the error found in the general intent instruction, but rejected the state's argument that the instructions delineating the elements of attempted murder and robbery were rhetorically inconsistent with a conclusive presumption of intent. The Connecticut Supreme Court failed to address the state's claim that the error was harmless.

## SUMMARY OF ARGUMENT

I. The Connecticut Supreme Court erroneously applied a rule of automatic reversal when it could have determined the effect of the erroneous jury instruction on the verdict in this case. The *Sandstrom* Court, after concluding that a challenged presumption instruction could be interpreted as conclusive or burden-shifting, left open the application of the harmless constitutional error rule of *Chapman v. California*, 386 U.S. 18 (1967). The *Chapman* Court refused to adopt a rule of automatic reversal for constitutional errors. Since the prejudicial impact of erroneous jury instructions on the verdict is determinable, *see, e.g., Hamling v. United States*, 418 U.S. 87, 108 (1974); *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973), automatic reversal for *Sandstrom* error is not warranted under the principles of *Chapman*. *Bollenbach v. United States*, 326 U.S. 607 (1946) and *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947), are distinguishable on their facts and do not supply support for a rule of automatic reversal for unconstitutional jury instructions. Erroneous jury instructions, like most other constitutional errors, should be evaluated for harmlessness in light of the total setting of the particular case. *See Cupp v. Naughten*, 414 U.S. at 147; *Chapman v. California*, 386 U.S. at 22-23; *Kotteakos v. United States*, 328 U.S. 750, 763-764 (1946).

II. A. Harmless error review requires the appellate court to determine the impact of the error on the verdict. *Chapman v. California*, 386 U.S. at 24. This Court's recent decisions suggest the entire trial record may be examined to determine whether a constitutional error is harmless beyond a reasonable doubt. *E.g., Milton v. Wainwright*, 407 U.S. 371, 377 (1972). It may also be appropriate to ask whether the jury would have reached the same result had the error not occurred. *Id., Schneble v. Florida*, 405 U.S. 427, 432 (1972). As the *Chapman* Court suggested, constitutional error may not

be harmless in a case "in which the question of guilt or innocence is a close one," but even "highly prejudicial evidence or comments" can be established harmless beyond a reasonable doubt under the circumstances of the "particular case." Once a jury instruction is found constitutionally invalid under *Sandstrom*, the reviewing court should determine whether in light of the entire trial record it was reasonably possible that the instruction resulted in a conviction when there still was a reasonable doubt about the truth of an essential element of the crime. This test is consistent with the *Sandstrom* decision and the constitutional values that it protects.

B. The twice repeated phrase "every person is conclusively presumed to intend the natural and necessary consequences of his act" in an otherwise highly permissive, detailed and informative charge does not preclude a finding of harmless error in this case in light of the entire trial record. Viewed in their entirety, the instructions were not an irrebutable direction to find intent, unlike those in *United States v. United States Gypsum Co.*, 438 U.S. 422, 430 (1978) and *Morrissette v. United States*, 342 U.S. 246, 249 (1952). In determining the respondent's guilt of attempted murder, moreover, if the jury had followed the presumption instruction, they would not have reached an irrational result. However, since the jury were told to consider the surrounding circumstances, infer intent from conduct and determine intent from all the evidence, there is no reasonable possibility that the erroneous jury instruction caused the jury to convict despite a reasonable doubt about the respondent's intent. In light of the overwhelming evidence of the respondent's intent to commit larceny, the clear definitional instructions given concerning the requisite intent, and the absence of any reference to the presumption instruction, there is no reasonable possibility that the jury based its robbery verdict on the erroneous general instruction. Consequently, in view of the entire trial record, the *Sandstrom* error was harmless beyond a reasonable doubt because it did not contribute to either conviction.

## I. A FINDING OF *SANDSTROM* ERROR DOES NOT REQUIRE AUTOMATIC REVERSAL OF THE CONVICTION.

In this case, once it completed parsing the jury instructions to conclude that portions offended *Sandstrom v. Montana*, 442 U.S. 510 (1979)[5], the Connecticut Supreme Court automatically reversed convictions on two counts without considering the state's argument that any *Sandstrom* error in the case could be found harmless beyond a reasonable doubt. By refusing even to comment[6] on whether the *Sandstrom* error was susceptible to a harmless error analysis, the Connecticut Supreme Court effectively adopted a rule of automatic reversal for what it deems *Sandstrom* error.[7]

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[5]*See* opinion of the Supreme Court of Connecticut, parts I.A. and I.C. (J.A. 63A-64A, 65A-67A).

[6]The harmless error issue was directly presented to the Connecticut Supreme Court in the briefs of both parties, on oral argument, and in the state's motion for reargument. The court refused comment both in its opinion and its decision denying reargument. (J.A. 56A-67A, 71A, 73A).

[7]In a case decided some eight months before this one, *State v. Truppi*, ___ Conn. ___ (42 Conn. L.J. No. 25, pp. 1, 7) (Dec. 1, 1980), *cert. denied*, 451 U.S. 941 (1981), the Connecticut Supreme Court had given a strong indication that it was inclined to adopt an automatic reversal rule for *Sandstrom* error when it expressly refused to apply a harmless error test and "weigh the evidence of guilt against the uncured damage done by the harmful portions of the instructions." In its brief in this case, the state specifically asked the Connecticut Supreme Court to reconsider its *Truppi* position, suggesting that the differences in the jury instructions in the two cases compelled the court to consider whether the error here was harmless. In *Truppi*, the jury were told, in part, that "the State of Connecticut does not have to offer evidence to prove that a man charged with a crime actually had a guilty intent or guilty knowledge. This is because a man is presumed to have intended to do the acts which he did do." This "no evidence" instruction supplied the rationale for the court's refusal to consider the evidence and allowed it to reject the harmless error argument. It also relied on dicta from *Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

In adopting an automatic reversal rule in this case, the Connecticut Supreme Court clearly decided a federal question. *Chapman v. California*, 386 U.S. 18, 21 (1967). This Court's "responsibility to determine whether a right guaranteed by the United States Constitution has been denied necessarily encompasses the responsibility of determining the consequences that flow from the denial of that right, particularly whether reversal is necessary to vindicate the right." R. Traynor, *The Riddle of Harmless Error*, 40 (1970).

In *Sandstrom v. Montana*, 442 U.S. at 526-27, the Court left open the question whether a jury instruction found unconstitutional under its precepts can constitute harmless error under *Chapman* and it progeny. Indeed, on remand the Supreme Court of Montana followed the *Sandstrom* Court's invitation to determine whether the unconstitutional instruction was harmless in that case, concluding that it was not. *State v. Sandstrom*, ____ Mont. ____, 603 P.2d 244, 245 (1979). While several commentators have suggested that *Sandstrom* error can never be harmless, *see, e.g.*, Schmolesky, *County Court of Ulster County v. Allen* and *Sandstrom v. Montana: The Supreme Court Lends An Ear But Turns Its Face*, 33 Rutgers L. Rev. 261, 294-95 (1981); Note, *Presumptive Intent Jury Instructions After Sandstrom*, 1980 Wis. L.Rev. 366, 381 (1980), many courts disagree. *See, e.g., United States v. Winter*, 663 F.2d 1120, 1143-45 (1st Cir. 1981); *McGuinn v. Crist*, 657 F.2d 1107, 1108 (9th Cir. 1981); *Jacks v. Duckworth*, 651 F.2d 480, 487 (7th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3547, 42 CCH S.Ct. Bull B658 (Jan. 11, 1982). *Washington v. Harris*, 650 F.2d 447, 454 (2d Cir. 1981); *Dietz v. Solem*, 640 F.2d 126, 131 (8th Cir. 1981); *United States v. Bohlmann*, 625 F.2d 751, 753 (6th Cir. 1980).[8] *But see Chap-*

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[8]State courts of last resort willing to apply harmless error analysis to *Sandstrom* error include: *Hosch v. State*, 246 Ga. 417, 271 S.E.2d 817, 820 (1980) (analysis applied and error found not harmless); *People v. Wright*, 408 Mich. 1, 289 N.W.2d 1 (1980) (error found harmless under *Chapman*); *State v. McKenzie*, ____ Mont. ____, 608 P.2d

*man v. California*, 386 U.S. at 44 (Stewart, J., concurring); *Hammontree v. Phelps*, 605 F.2d 1371, 1380 (5th Cir. 1979) (statutory presumption).[9]

The rationale for requiring automatic reversal is that there are certain kinds of errors whose prejudicial impact is inherently indeterminable. Thus, in holding "that whenever a trial court improperly requires joint representation over timely objection reversal is automatic," *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978), Chief Justice Burger, writing for the Court, noted the impossibility of assessing how the conflict affected the attorney's decision-making, choice of tactics, and general trial strategy. *Id.* at 490-91. Consequently, a reviewing court would have no way to determine the impact of the error on the conviction.[10]

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428, 458, *cert. denied*, 449 U.S. 1050 (1980) (error found harmless under *Chapman*); *People v. Thomas*, 50 N.Y.2d 467, 407 N.E.2d 430, 429 N.Y.S.2d 584 (1980) (Fuchsberg, J., concurring) (harmless error analysis should be applied); *State v. Sheldon*, 301 N.W.2d 604, 613 (N.D. 1980) (analysis applied and error found not harmless).

[9]The Fifth Circuit has also taken the position that a burden-shifting jury instruction does not require automatic reversal if there is evidence before the jury of objective conduct demonstrating intent. *See, e.g., United States v. Caucci*, 635 F.2d 441, 447 (5th Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 128, 70 L.Ed.2d 128 (1981).

[10]The *Chapman* Court did state in dicta that "our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless," *Chapman v. California*, 386 U.S. 18, 23 and n. 8 (1967), citing, as examples, impartial judge, right to counsel, and coerced confessions. In *Mincey v. Arizona*, 437 U.S. 385, 398 (1978), the Court affirmed that use of an involuntary statement in a criminal trial is automatically reversible. But in *United States v. Morrison*, 449 U.S. 361, 365 (1980), the Court indicated that "certain violations of the right to counsel may be disregarded as harmless error." Furthermore, Justice Stewart, dissenting in *Kentucky v. Whorton*, 441 U.S. 786, 790-91 (1979), noted that the failure to give a presumption of innocence instruction, which he deemed constitutional error, could be harmless error under appropriate circumstances.

But cases teach that the effect of erroneous jury instructions on the result is determinable. *See, e.g., Hamling v. United States,* 418 U.S. 87, 108 (1974); *Cupp v. Naughten,* 414 U.S. 141, 146-147 (1973); *Turner v. United States,* 396 U.S. 398, 421 (1970). *Cf. Chiarella v. United States,* 445 U.S. 222, 239, 244 (1980) (Burger, C.J., dissenting) (Erroneous jury instructions harmless beyond a reasonable doubt.) Indeed *Sandstrom* itself and the case with which it is inevitably linked, *County Court of Ulster County v. Allen,* 442 U.S. 140, 157-59, n. 16 (1979), in requiring a reviewing court to determine how a reasonable juror would have interpreted a "presumption instruction," *Sandstrom v. Montana,* 442 U.S. at 514, 517, suggest that the task of assessing its impact on the result is not impossible.

The respondent may suggest, as he did in his brief in opposition to the petition for writ of certiorari, that because the Connecticut Supreme Court identified the instruction in this case as an "express conclusive presumption" (J.A. 62A-63A) it correctly applied a rule of automatic reversal.[11] In petitioner's view, the characterization of the instruction as a conclusive presumption does not preclude a harmless error analysis. Such characterization did not prevent the *Sandstrom* Court from

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[11]Similarly, it may be argued that the *Sandstrom* dicta "we cannot discount the possibility that Sandstrom's jurors actually did proceed upon [an interpretation giving the presumption conclusive or burden-shifting effect]," *Sandstrom v. Montana,* 442 U.S. at 519, precludes harmless error analysis. A similar argument was made, and rejected, in *Harrington v. California,* 395 U.S. 250, 254 (1969). ("It is argued we must reverse if we can imagine a single juror whose mind might have been made up because of [the erroneously admitted] confessions and who otherwise would have remained in doubt and unconvinced.")

Furthermore, the *Sandstrom* Court's remand on the harmless error issue suggests that this language was not intended to limit harmless error review, but rather as an analytic device in determining the nature of the presumption instruction. Indeed, the *Sandstrom* Court's language, suggesting merely a "risk" or "possibility" or prejudice as opposed to an absolute conclusion, leaves open the issue of harmless error.

suggesting that the state court was free to review the case for harmless error. Furthermore, the petitioner still entertains serious doubt that the trial court gave a true conclusive presumption instruction. *See* fn. 21 *ante.* Finally, under the circumstances of this case,[12] the instruction may have protected the respondent's due process interest more than a burden-shifting one that required him to prove an element of the offense. *See Mullaney v. Wilber,* 421 U.S. 684, 700-01 (1975). Whether the instruction is of the conclusive or burden-shifting variety, it is the petitioner's position that it is appropriate, and possible, to measure its impact on the result.

Support for an automatic reversal rule in cases containing conclusive presumption instructions has been derived from cases such as *Bollenbach v. United States,* 326 U.S. 607 (1946). *See Chapman v. California,* 386 U.S. at 44 (Stewart, J., concurring); *State v. Truppi,* ___ Conn. ___, (42 Conn. L.J. No. 25, pp. 1, 7) (Dec. 16, 1980), *cert. denied,* 451 U.S. 941 (1981). Upon close examination, however, *Bollenbach* is not an automatic reversal case at all. The Court was able to find that the erroneous instruction was not harmless because there was demonstrable prejudice.

The *Bollenbach* Court was clearly impressed with the sequence of events after the case went to the jury. After deliberating for seven hours, the jury reported a hopeless deadlock. Only then did the trial court give an erroneous presumption instruction, to which the accused's attorney objected. Five minutes later, the jury

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[12]Indeed, in the context of this case application of the harmless error rule may be particularly appropriate because the trial preceded authoritative disapproval of the instruction by this Court and the Connecticut Supreme Court, it was not objected to on any grounds, and it was derived from language in a recently decided Connecticut Supreme Court case, *State v. Ruiz,* 171 Conn. 264, 277, 368 A.2d 222 (1976): " 'A person's intention may be inferred from his conduct . . . and every person is conclusively presumed to intend the natural and necessary consequences of his acts [citation omitted]' . . . ."

returned a guilty verdict on the count to which the erroneous instruction was directed. *Bollenbach v. United States*, 326 U.S. at 609-10. Noting that the error was "not cured by a prior unexceptional and unilluminating abstract charge," *id.* at 612, the Court took into account the following factors: the instruction was the judge's "last word," it was a specific ruling on a vital issue and was misleading, the jury were tired and confused, and the jury made their difficulties known. Further, the Court was able to reject the government's harmless error argument, which was premised on the existence of other proof, because under the circumstances it was able to determine the precise effect of the instruction on the result.[13]

Another case relied upon to support an automatic reversal rule is *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947). *See Hammontree v. Phelps*, 605 F.2d at 1380. While certain dicta supports this reading,[14] *Carpenters* does not supply a rationale for automatic reversal of *Sandstrom* error. There, the defendants requested an instruction embodying a correct interpretation of §6 of the Norris-LaGuandia Act which

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13 "The Government argues that the sting of error is extracted because there was proof, other than the erroneous 'presumption', on the issue of Bollenbach's participation in the wrongdoing before the transportation of stolen securities had ended. This is to disregard the vital fact that for seven hours the jury was unable to find guilt in the light of the main charge, but reached a verdict of guilty under the conspiracy count five minutes after their inquiry was answered by an untenable legal proposition."

*Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

14 The dicta relied upon in *Hammontree v. Phelps*, 605 F.2d at 1380, was extracted from the following paragraph:

> So far as the Unions, both local and national, are concerned, the necessity under our construction for an instruction based on §6 is apparent. The United Brotherhood was not a party to any of the agreements. Local

substantially limited their liability, but their interpretation was not clearly held to be correct until the Court decided *Carpenters* itself. *United Brotherhood of Carpenters v. United States*, 330 U.S. at 406-07. The trial court instructed on a different and erroneous concept of the law. Under these circumstances which were aggravated by the trial court's failure to grant the correct request, the Court refused to examine the evidence to hold the error harmless.

Nonetheless, in a decision intervening between *Bollenbach* and *Carpenters*, the Court readily acknowledged that jury instruction errors may be deemed harmless in the face of other clear evidence. *Kotteakos v. United States*, 328 U.S. 750, 763 (1946). Indeed, the

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> unions took a more definite part than the United Brotherhood. In some instances the name of a local union was signed to the agreement that contained the restrictive clause. Necessarily acts performed by or for the unions were done by their individual officers, members or agents. We do not enter into an analysis of the evidence that was relied upon to show the participation of the unions in the conspiracy. The evidence in any new trial may be quite different. No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under §6 of such association or organization for acts of its agents. For a judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions, note 19 above, or on actual authorization, or ratification of such acts, note 18. A failure to charge correctly is not harmless, because the verdict might have resulted from the incorrect instruction. We are of the opinion, therefore, that the judge should have instructed the jury as to the limitations upon the association's liability for the acts of its agents. The error is aggravated by the failure to give the correct instruction upon request.
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> *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408-09 (1947) (footnotes omitted).

*Kotteakos* Court in an analytic approach remarkably similar to the one articulated in *Cupp v. Naughten*, 414 U.S. at 147, suggested that error must be evaluated in the total setting, "not singled out and standing alone, but in relation to all else that happened," to determine its impact on the verdict. *Kotteakos v. United States*, 328 U.S. at 764.

The petitioner respectfully suggests that *Cupp* may supply the starting point for a *Chapman* harmless error review of instructions offensive to *Sandstrom*. *See Jacks v. Duckworth*, 651 F.2d at 487; *Cf. United States v. Wolters*, 656 F.2d 523, 525-526 (9th Cir. 1981) (*Cupp* applied to presumption instruction). *Sandstrom* error is particularly well suited for harmless error analysis that examines the offensive instruction in light of the entire trial. A concededly erroneous intent instruction may have no impact on the jury's verdict when the defense is alibi, *McGuinn v. Crist*, 657 F.2d at 1109, or denial, *United States v. Winter*, 663 F.2d at 1144-45, or, as in this case, when intent is not put in issue and the factual finding turns solely on the credibility of the prosecution's only eyewitness to the events, the victim. *E.g., United States v. Reeves*, 594 F.2d 536, 537-38 (6th Cir. 1979).

In developing its constitutional harmless error rule, the *Chapman* Court stressed that constitutional errors must be evaluated "in the setting of a particular case" and wisely refused to adopt a rule of automatic reversal for all constitutional errors. *Chapman v. California*, 386 U.S. at 22-23. A defendant's legitimate interests are not left unprotected by the proper application of a harmless constitutional error rule to *Sandstrom* error. Under the circumstances of this case, automatic reversal was not warranted because the Connecticut Supreme Court could, in fact, determine the effect of the erroneous instruction on the jury's verdict.

## II. AS THERE IS NO REASONABLE POSSIBILITY THAT THE *SANDSTROM* ERROR CONTRIBUTED TO THE VERDICT, IT MAY BE HELD HARMLESS BEYOND A REASONABLE DOUBT

### A. *Sandstrom* Error Must Be Tested For Harmlessness In The Context of the Entire Trial Record.

Since *Chapman*, this Court has been evolving a standard for harmless error review. *Chapman* purported to incorporate the reasonable possibility standard from *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963),[15] but stated the test as follows: "The beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. at 24. Shortly after deciding *Chapman*, the Court in *Harrington v. California*, 395 U.S. 250, 254 (1969), concluded that a *Bruton* violation was harmless beyond a reasonable doubt in part because the evidence was so overwhelming. Justice Douglas, writing for the Court, cautioned that *Harrington* was not a departure from *Chapman*. *Id.* at 254. Indeed, *Harrington* is reconcilable with *Fahy* and *Chapman* because the *Harrington* Court stressed that its harmless error review required it to look at "the probable impact of the [error] on the minds of an average jury," *id.*, another way of asking whether the error contributed to the verdict.

More recent decisions, particularly *Milton v. Wainwright*, 407 U.S. 371 (1972), suggests that a review of the entire trial record, including a factual inquiry, is the only way in which a court can determine the impact of the error on the verdict. *Parker v. Randolph*, 442 U.S. 62, 71 (1979); *id.* at 77, 80 (Blackmun, J., concurring);

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[15] "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

*Schneble v. Florida*, 405 U.S. 427, 431-32 (1972). *Cf. Holloway v. Arkansas*, 435 U.S. at 488. ("Assessing the strength of the prosecution's evidence against the defendant is, of course, one step in applying a harmless error standard,"). Moreover, *Milton* and *Schneble* suggest that it may be appropriate to ask whether the jury would have reached the same result had the error not occurred. *Milton v. Wainwright*, 407 U.S. at 377; *Schneble v. Florida*, 405 U.S. at 432.

In examining the record for, among other things, overwhelming evidence of guilt, the reviewing court is not conducting an independent factual inquiry to determine how it would decide the case but rather is only looking to see how the error influenced the verdict. This type of review does not invade the province of the jury, *see* R. Traynor, *The Riddle of Harmless Error*, 13 (1970); Note, *Harmless Constitutional Error: A Reappraisal*, 83 Harv. L.Rev. 814, 819 (1970), despite suggestions that it does. *See* Field, *Assessing The Harmlessness of Federal Constitutional Error - A Process In Need Of A Rationale*, 125 U.Pa. L.Rev. 15, 33-34 (1976). Finally, since the cases require not simply sufficient but overwhelming evidence before an error can be declared harmless beyond a reasonable doubt, a reviewing court should be able to say that there is no reasonable possibility that the jury would have found the state's case less persuasive, but for the error, and thus entertained a reasonable doubt about an essential element of the crime. *Schneble v. Florida*, 405 U.S. at 432. *See generally*, Saltzburg, *The Harm of Harmless Error*, 59 Va. L.Rev. 988, 1021, 1027, 1028 (1973).

The standard for harmless error review stated in the more recent cases, suggesting review upon the entire record, should govern review of jury instructions held unconstitutional under *Sandstrom*. It is difficult to conceive how a court could measure the effect of the *Sandstrom* - condemned instruction on the jury without considering it in the context of the entire trial record. And, entire trial record review comports with the

philosophy expressed by Justice Rehnquist, writing for the Court in *Cupp v. Naughten*, 414 U.S. at 147:

> [A] judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.

The *Sandstrom* Court's concern with the manner in which the presumption instruction could have been interpreted by a reasonable juror, *Sandstrom v. Montana*, 442 U.S. at 514, is not inconsistent with review of the entire trial record.[16] *See County Court of Ulster County v. Allen*, 442 U.S. at 157-59. It may be argued, however, that the presumption instruction should be tested on its face for rationality in the same way that mandatory statutory presumptions are tested. *Id.; see Turner v. United States*, 396 U.S. at 401-02; *Leary v. United States*, 395 U.S. 6, 30 (1969); *United States v. Romano*, 382 U.S. 136, 138 (1965); *Tot v. United States*, 319 U.S. 463, 467 (1943). But, the analysis used in these cases is for determining the constitutional validity of the presumption and should not be adopted as an appropriate harmless error analysis for an instruction found invalid under *Sandstrom*. *Cf. Sandstrom v. Montana*, 442 U.S. at 519 and n. 9 (where the Court rejected using the *Allen* line of cases to test the constitutionality of the presumption instruction). Unlike

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[16] A juror's comprehension and interpretation of an instruction depends not only on its vocabulary and linguistic construction, but also on the context of the trial. *See generally* R. Charrow & V. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L.Rev. 1307, 1317 (1979). The authors also suggest that jury interaction during deliberations may enhance or diminish their comprehension of the instructions. *Id.* at n. 29.

the mandatory statutory presumptions discussed in the *Allen* line of cases, which could be tested in the abstract for accuracy, instructions such as the one given in this case can only be tested in context. In fact, they may prove accurate because of the particular factual circumstances[17] or they may be simply irrelevant due to the theory of the case, *see, e.g., United States v. Winter,* 663 F.2d at 1143-45, or the defense presented. *See, e.g., McGuinn v. Crist,* 657 F.2d at 1109. Finally, it is only by viewing the erroneous instruction in context that a court can determine whether it was reasonably possible that the instruction resulted in a conviction when there still was a reasonable doubt about the truth of an essential element of the crime.

Examining the impact of the erroneous instruction in light of the entire trial record does not circumvent the intent of the *Sandstrom* Court to protect the constitutional standard of proof. *Sandstrom v. Montana,* 442 U.S. at 520; *Patterson v. New York,* 432 U.S. 197 (1977); *Mullaney v. Wilbur,* 421 U.S. 684 (1975); *In re Winship,* 397 U.S. 358 (1970). These cases are all concerned with the reliability of the conviction in a criminal case.[18] They require the state to prove every element necessary to constitute the crime beyond a reasonable doubt in

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[17] Some commentators suggest that some "presumption" instructions may be viewed as "functionally indistinguishable" from judicial comment on the evidence which guides the jury to perceive a relationship among facts that may not be apparent. Allen, *Structuring Jury Decisionmaking In Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices,* 94 Harv. L.Rev. 321, 335 (1980). *See generally* Nesson, *Rationality, Presumptions, and Judicial Comment: A Response to Professor Allen,* 94 Harv. L.Rev. 1574, 1584 (1981). If judicial comment is accurate it can, as Professor Allen suggests, "prevent an erroneous verdict when the jury is unable to appreciate the implications of certain facts proven at trial." Allen, *supra* at 349.

[18] For example, in *Mullaney v. Wilbur,* 421 U.S. 684, 701 (1975), the jury instruction which required the defendant to prove a critical fact in dispute markedly increased the likelihood of an erroneous conviction and markedly decreased the reliability of the jury's verdict when viewed in light of the evidence and the defense

order to substantially reduce "the risk of conviction based on factual error." *Id.* at 363. Reducing the margin of error helps to protect against the conviction of innocent persons. *Id.* at 368, 371-72 (Harlan, J., concurring). However, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson v. New York*, 432 U.S. at 208. Due process requirements should be satisfied if a reviewing court can fairly assess the reliability of the jury's verdict by examining the constitutional error in the context of the entire trial record. As suggested in *Chapman v. California*, 386 U.S. at 22-24, constitutional error may not be harmless in a case "in which the question of guilt or innocence is a close one," but even "highly prejudicial evidence or comments" can be established harmless beyond a reasonable doubt under the circumstances of the "particular case."

### B. The *Sandstrom* Error Was Harmless Beyond A Reasonable Doubt.

Although the petitioner is not before this Court to challenge or relitigate the Connecticut Supreme Court's conclusion that the presumption instructions violated

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posture that the defendant lacked unlawful intent and acted in the heat of passion.

However, in *Patterson v. New York*, 432 U.S. 197, 199 at n. 4 (1977), while the defense was extreme emotional disturbance, the evidence established an intentional killing beyond a reasonable doubt. Therefore, an instruction placing the burden on the defendant to prove his defense by a preponderance of the evidence had no likelihood of causing an unreliable verdict. *See, id.* at 206.

Finally, in *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979), the defendant confessed to the killing but sharply disputed that he had the requisite mental state. Thus, the erroneous instruction markedly decreased the reliability of the verdict because it essentially removed resolution of this dispute from the jury's consideration.

*Sandstrom*, since the instructions should be examined in the context of the entire charge and the trial record to determine whether they contributed to the respondent's conviction, it is helpful to review that court's analysis. The Connecticut Supreme Court applied *Sandstrom* formalistically in this case. It is clear from the court's opinion that if the trial court had omitted the word "conclusively," the instructions would have passed constitutional muster because there were other very detailed, precise and highly permissive instructions that explained the nature of drawing reasonable inferences from the evidence, described the jury's fact finding role, cautioned the jury to resolve all questions of fact only upon careful consideration of all the evidence, and stressed the state's burden of proving every element of each crime charged beyond a reasonable doubt. (J.A. 62A).

By parsing the charge as finely as it did, the Connecticut Supreme Court may have attributed too much legal ability to the jury in this case. *See Sandstrom v. Montana*, 442 U.S. at 527, 528 (Rehnquist, J., concurring); *Nelson v. Scully*, No. 81-2208, slip Op. at 1057 (2nd Cir. Jan. 28, 1982). In the course of a charge that fills fifty-nine pages of transcript (R.T. 954-1013, J.A. 13A-48A) the trial court used the presumption instruction twice, and each time prefaced and concluded the presumption instruction with language that suggested other ways to find intent without using the presumption instruction. For example, in the general instruction on intent,[19] the jurors were told intent was a question of

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19 "However, the question of intent should cause you no great concern because intent is a question of fact that is solely within your province as jurors. However, you should be aware of a rule of law that will be helpful to you and that is that a person's intention may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act."

(R.T. 969, J.A. 22A-23A).

fact that they were to decide and the presumption instruction was prefaced by a permissive instruction telling the jury they could infer intent from conduct. (R.T. 969, J.A. 22A). Immediately after the presumption instruction the court explained that the jury could look at evidence other than the criminal conduct or act, such as evidence showing consciousness of guilt or motive, in determining intent. (R.T. 969-971, J.A. 22A-24A).

When the trial court repeated the presumption in instructing on the attempted murder count (R.T. 972-974, J.A. 24A-26A) it again used the words "infer" and "presume" interchangeably and the presumption instruction was prefaced with an explanation to infer intent from the defendant's conduct in light of the surrounding circumstances. The court never told the jury that they must find intent based solely on the isolated fact that the defendant acted. Rather, the jury were told to examine all the evidence and to credit or reject the victim's direct evidence of the incident as they saw fit. As the Connecticut Supreme Court found, the trial court "undercut its conclusive language" (J.A. 64A) by instructing the jury that if they believed the victim's testimony "you may presume he intended what would be the natural and necessary consequences of his actions, under the prevailing circumstances and conditions." (R.T. 973, J.A. 25A). Further, the jury were instructed that they could find intent beyond a reasonable doubt only by examining all the evidence. (R.T. 974, J.A. 15A-26A).

Thus, in contrast to cases such as *United States v. United States Gypsum Co.*, 438 U.S. 422, 430, 446 (1978) and *Morrissette v. United States*, 342 U.S. 246, 249 (1952), where the instructions expressly and unequivocally removed the element of intent from the jury's consideration,[20] the instruction here, although

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[20] In *United States v. United States Gypsum Co.*, 438 U.S. 422, 430 (1978), the trial court instructed that: "The law presumes a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchange of pricing information was to

characterized as an "express conclusive presumption," was in context comparatively more ambiguous, and when viewed with the other instructions does not leave the impression that the jury were compelled to abide by the instruction in finding intent beyond a reasonable doubt.[21] While this may not be sufficient to salvage the

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raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result." The trial court gave an even more egregious instruction in *Morrissette v. United States*, 342 U.S. 246, 249 (1952), stating: "If you believe the government, he is guilty.... The question on intent is whether or not he intended to take the property. He says he did [take the property]. Therefore, if you believe either side, he is guilty."

Notably, the circumstances giving rise to criminal liability in both cases required the jury to decide a very close question concerning whether the defendants were acting legitimately or illegitimately. In *Morrissette*, the defendant claimed he took the spent bomb casings because he thought they were abandoned. *Id.* at 247-249. In *United States v. United States Gypsum Co.*, 438 U.S. at 440-441, the proscribed behavior was difficult to distinguish from socially acceptable and economically justified business conduct. In this case, the circumstances do not suggest legitimate activities.

21 It is doubtful that in context the instruction was understood as a true conclusive presumption, which is technically not a presumption at all but rather "an irrebutable direction by the court to find intent once convinced of the facts triggering the presumption." *Sandstrom v. Montana*, 442 U.S. at 517. As defined by James & Hazard, *Civil Procedure* §7.9 (2nd ed. 1977), a conclusive presumption means: "If A is shown, then B is presumed without question and the court will not even receive evidence or entertain argument to show the non-existence of B. And the court will direct a jury that if they find A to be proven, they *must* also find B...." Thus, the hallmark of the conclusive presumption is that no evidence can rebut the finding of an elemental fact; indeed no evidence is necessary to prove it if the basic fact is shown. In this case, the jury were repeatedly told, directly and indirectly, that they had to find the elemental facts of all the crimes based on all the evidence. (R.T. 955, 956, 974, 1010, J.A. 14A, 15A, 25A, 46A, 47A). And aside from the twice used phrase "conclusively presumed," all of the trial court's other references to the element of intent were phrased in terms of inference (R.T. 969, 973, 974, 978, J.A. 22A, 23A, 25A, 26A, 28A), or were definitional. (R.T. 988-990, J.A. 34A-35A).

instruction's constitutionality, it does provide a measure for determining its effect on the outcome and, thus, its relative harm.

As a general matter, in a criminal case the jury can only determine specific intent by examining the evidence of the defendant's acts and statements, if any, in light of the surrounding circumstances. *Morrissette v. United States,* 342 U.S. at 276.

> Actions of the accused are set in time and place in many relationships. Environment illuminates the meaning of acts, as context does that of words. What a man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, the give and take of the situation.
>
> *Cramer v. United States,* 325 U.S. 1, 32-33 (1945).

The respondent's jury were told to consider all the circumstances surrounding his acts and there was both direct and circumstantial evidence available for the jury's consideration. Moreover, the jury were made to understand repeatedly that the burden of proof was squarely on the state to establish every element of each crime beyond a reasonable doubt.

When review of the record is expanded to consider how the jury would have applied the court's intent instructions in light of the evidence, it becomes clearer that the respondent's jury would not have found that he had the requisite specific intent for attempted murder and first degree robbery simply by finding that the state had proved the respondent's acts beyond a reasonable doubt.

**1. Attempted Murder Conviction.**

The respondent's intent to cause the victim's death was established by other evidence than his act of throwing her into a river with her hands bound. The sequence of events during the incident was important because the jury were told they could consider consciousness of guilt and motive in determining intent. The "act" culminated a five-hour ordeal for the victim in which the respondent was the most active participant and the most vicious. During those hours the victim had ample opportunity to observe the respondent, as well as his companions. After the sexual assault, the respondent told the victim they were going to drop her near a phone booth, but instead he bound her hands, attempted to bind her feet, pulled her out of the car, forced her to run to the middle of the bridge, threw her over the bridge and, when he realized she had not landed in the water, pursued her. It was approximately four to four-thirty in the morning, the area was secluded, there was snow on the ground, and the air temperature was substantially below freezing. Rational jurors, applying their common sense and experience, would draw reasonable inferences of an intent to cause death from all the evidence, not just the respondent's act of throwing the victim over the bridge into the river. Furthermore, the jury were explicitly instructed to consider all the surrounding circumstances and conditions before reaching a decision about the element of intent and were told twice that they must base their decision "upon all the evidence." (R.T. 974, J.A. 25A).

Unlike *Sandstrom*, the respondent's intent was not disputed. The defense focused on whether the victim willingly allowed the respondent into her car initially and willingly engaged in sexual activities with the respondent and the other four men, out of choice or because they had offered her money. The victim clearly perceived the respondent's intent, for when she sought help she cried, "Please let me in . . . they were trying to kill me." The jury could have considered this evidence as well because the respondent had been charged as

principal and accessory; however, the jury would have had little difficulty finding that the respondent was in fact the most principal actor. Indeed, he gave orders to the others, directing where they should go and dictating what was going to happen.

The jury would not have reached an irrational result, given the evidence, if they followed the court's instructions and inferred intent from the respondent's conduct, presumed he intended the natural and necessary consequences of his actions under the prevailing circumstances and conditions, including the sequence of events, the weather conditions, the victim's condition, the amount of force used and the pursuit, and found "upon all the evidence" that the respondent had formed in his mind the intention to cause the victim's death. Stated another way, upon this evidence, no juror would have had a reasonable doubt about the respondent's intent to cause the victim's death. Therefore, there was no reasonable possibility that the erroneous instruction resulted in a conviction on the attempted murder charge when there otherwise would have been an acquittal. Since the error could not have contributed to the verdict, it was harmless beyond a reasonable doubt.

**2. First Degree Robbery Conviction.**

The Connecticut Supreme Court clearly erred in refusing to find harmless the trial court's failure to include in the robbery instruction a permissive explanation to the jury about how to find intent, which it viewed as necessary to cure the taint of the presumption given in the court's general instruction on intent. First, the Connecticut Supreme Court acknowledged that in instructing on the robbery count the applicable element of intent was properly explained to the jury. (J.A. 65A). Indeed, the jury were told specifically that the "State must prove that the property was taken by Defendant with the specific intention of depriving the owner or some other person of it or of appropriating it to himself or to some third person." (R.T. 988, J.A. 34A). Then the court defined "deprive" and "appropriate" in context

and told the jury "[t]he property must have been taken ... for the purpose of keeping or using it permanently ...." (R.T. 988-989, J.A. 34A-35A). And, using a "joy ride" as an example, the court explained that to borrow a car intending to return it is not larceny.[22] These instructions were clear and the jury could apply them directly to the evidence; they needed no further explanation of how to find the requisite intent.

The Connecticut Supreme Court also found that the trial court had not repeated or incorporated the presumption instruction in the robbery instructions. (J.A. 65A). Further, the court recognized that since the trial court, in the kidnapping instructions, had just charged the jury on intent in highly permissive terms,[23] "[a]s a practical matter, the curative effect of the preceding instructions would probably be more important in the jury's consideration then the earlier erroneous instruction...." (J.A. 66A). Nonetheless, the Connecticut Supreme Court held, in effect, that the absence of a curative instruction in this portion of the charge was automatically reversible error and refused to consider whether the omission was harmless beyond a reasonable doubt. *Cf. Henderson v. Kibbe,* 431 U.S. 145, 155 (1977) (omission or incomplete instruction less likely to be prejudicial).

Since it must be assumed that the jury followed the trial court's clear and extensive instructions defining the requisite intent, the possibility that the jury found intent to commit robbery based on the erroneous general

---

[22]In fact, these instructions contradicted the presumption instruction because they made clear that the "natural and necessary consequences" of taking property are not necessarily that one intends to deprive the owner of it permanently or appropriate it to his own use.

[23]Notably, in this case the only supplemental instructions given on specific intent were the highly permissive instructions, framed in terms of inference, contained in the kidnapping charge. (R.T. 1029). Thus, the "last word" the jury heard on how to determine intent was phrased in constitutionally acceptable terms.

instruction is so slim as to be nonexistent. There was ample direct and circumstantial evidence upon which the jury could have found that the respondent intended to permanently deprive the victim of her car or appropriate it to his own use. Most telling was the respondent's own statement to the victim that they were going to take her car in order to make their get-away. The undisputed evidence also established that the victim did not relinquish control over her car voluntarily but that it was taken from her by force through the concerted actions of the respondent and his companions, that several of the respondent's companions were armed, that the victim was told the men "needed" a car, that the respondent and his companions were found in or near the car in Norwalk, Connecticut and that the victim had not given them permission to take the car to Norwalk.

Taken together, the overwhelming evidence that the respondent intended to commit larceny, a necessary element of robbery, and the absence of any presumption instruction in this portion of the charge make it extremely unlikely that the original presumption instruction had any impact on the jury's verdict on this count. Moreover, since the definitional instructions alone were sufficient to guide the jury to find the requisite intent, any error was harmless beyond a reasonable doubt.

## CONCLUSION

The judgment of the Connecticut Supreme Court, insofar as it set aside the judgment of conviction on the counts charging attempted murder and robbery in the first degree and ordered a new trial, should be reversed.

Respectfully submitted,

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# Respondent's Brief

Office - Supreme Court, U.S.
FILED
MAY 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-927

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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STATE OF CONNECTICUT,

*Petitioner,*

v.

LINDSAY B. JOHNSON,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

In a state criminal case where error under *Sandstrom v. Montana*, 442 U.S. 510 (1979), was found, because in both the general and specific instructions the jury was instructed on a "rule of law" that "every person is conclusively presumed to intend the natural and necessary consequences of his act," despite other general instructions that explained the nature of the inferences the jury could draw and the state's burden of proof and other specific instructions on the elements of each crime, should this error have been analyzed for harmlessness under *Chapman v. California*, 386 U.S. 18 (1967), and, if so, was the error of a conclusive presumption of intent harmless beyond a reasonable doubt in this case?

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## OPINIONS BELOW

The opinion of the Supreme Court of Connecticut has not yet been printed in the Connecticut Reports but is officially reported in the Connecticut Law Journal, volume 43, no. 5, p. 5 (August 4, 1981) and is printed in the appendix. (J.A. 56A-70A). An unofficial report of the opinion appears in 440 A.2d 858 (Conn. 1981).

## STATEMENT OF THE CASE

Respondent was accused in a four count information of attempted murder, kidnapping in the second degree, robbery in the first degree and sexual assault in the first degree.[1] The information named four other men as coparticipants and a female complainant as the victim. Only the Respondent's case was tried.[2] On November 2, 1976, a jury convicted him on all counts, and on November 24, 1976, a sentence of not less than twenty-eight nor more than fifty-six years was imposed.[3]

While Respondent's state appeal was pending, this Court announced its decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979). On the basis of *Sandstrom*, Respondent argued

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[1]The pertinent statutory provisions are set forth in the brief of Petitioner at 2-4.

[2]The four codefendants pleaded guilty to either some of the counts or to reduced charges prior to the commencement of Respondent's trial.

[3]Consecutive terms were imposed on the convictions for attempted murder (10-20 years), kidnapping in the second degree (8-16 years), and sexual assault in the first degree (10-20 years). A term of 5-10 years imposed on the conviction of robbery in the first degree was ordered to be served concurrently with the sentence imposed on the kidnapping conviction. (J.A. 51A, 53A).

that his due process rights had been violated when his jury was instructed that, according to a "rule of law," "a person's intention may be inferred from his conduct and every person is *conclusively presumed* to intend the natural and necessary consequences of his act." (Emphasis added.) Petitioner contended in response that, in the context of the entire jury charge, the challenged instruction stated neither a burden-shifting nor a conclusive presumption and, also, that any error which the instructions may have caused should be considered harmless in view of the evidence of Respondent's guilt.

On the basis of a thorough analysis of the entire jury charge, the Supreme Court of Connecticut reversed the convictions of attempted murder and robbery in the first degree (the first and third counts) and affirmed the convictions of kidnapping in the second degree and sexual assault in the fourth degree (the second and fourth counts).[4]

The Supreme Court of Connecticut did not directly address Petitioner's claim that since the evidence supported the verdicts, any instructional error was harmless. The clear

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[4]The Respondent's petition to have this Court review the affirmance of his conviction of kidnapping in the second degree was denied on December 7, 1981. *Johnson v. Connecticut*, U.S. _____, 102 S.Ct. 677. On or about March 1, 1982, the Respondent filed a motion for leave to file a petition for rehearing which was denied on March 29, 1982. The effect of the denial of the Respondent's petition is that, irrespective of the outcome of this case, he, in fact, will be required to serve the sentence imposed on the conviction for robbery in the first degree since, as explained in n.3, *supra*, it is subsumed in the greater concurrent sentence imposed on the conviction of kidnapping in the second degree. For this reason, the Court may consider that an application of the discretionary concurrent sentence doctrine is appropriate. *See Benton v. Maryland*, 395 U.S. 784, 791-93 (1969). In that event, the issues would involve only the attempted murder charge for which the trial court stated the conclusive presumption of intent in the general instructions and the specific instructions.

underlying premise of the court's decision is, however, that the instructional error of a conclusive presumption of intent may only be cured by other language in the charge itself. *See Turcio v. Manson*, 186 Conn. 1, 6-7, 439 A.2d 437 (1982); *State v. Truppi*, 42 Conn. L.J. No. 25, pp. 1, 6-7, 438 A.2d 712 (1980), *cert, denied* 451 U.S. 941 (1981).

### A. The Evidence Presented At The Trial

The evidence upon which Petitioner relies for its claim of harmless error came from the prosecution's witnesses: the complainant, the residents of the house where she was sheltered, police officers, a doctor and other expert witnesses.[5] Respondent did not testify[6] and called only one witness.[7] None of the (former) codefendants were called as witnesses.

On Saturday, December 20, 1975, the complainant, a

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[5]The reference R.T. denotes pages in four volumes of the consecutively numbered trial transcript. The reference R.T. 10/22/76 denotes pages from a separately numbered volume of trial transcript.

[6]Incidents of disruptive behavior during the presentation of the prosecution's case resulted in Respondent's absence from the courtroom for the remainder of the trial. (R.T. 511). He was present at the return and acceptance of the verdicts. (R.T. 1045-46). The claim made concerning his absence is discussed in part III of the opinion of the Supreme Court of Connecticut (J.A. 68A-69A).

[7]Respondent's witness was a detective from the New Haven Police Department who, on December 21, 1975, had tape recorded the first formal interview of the complainant. (R.T. 934-39). A transcription of the recording which had been prepared by an unidentified stenographer was provided for Respondent's counsel during his cross-examination of the complainant and subsequently introduced into evidence. (R.T. 258, 757-58). The detective stated that the transcription contained "basically the exact language" that was on the tape but also that he had examined the transcription only briefly and had not reviewed its contents with the complainant (R.T. 937-38). A comparison between the transcription and the tape could not be made because the tape had been erased for reuse pursuant to a policy of the police department. (R.T. 936).

white female, drove with her boyfriend from their college in New York State to the home of her parents in Connecticut. After a short stay, the complainant drove her boyfriend to the railroad station at Norwalk so that he could take the train at 10:30 p.m. (R.T. 19-20, 22).

When the complainant was driving home, she lost her way in Norwalk and asked four black men in an automobile for directions. One of the men, the Respondent, said the directions were complicated, and she accepted his offer to ride in her car in order to show her the way. (R.T. 24-5, 29). While riding together, with the other car following, they talked. Her recollection of the conversation was that it concerned what she did and where she went to school. On cross-examination, she did not recall if she told him that her boyfriend was black, and she denied that mention was made of going to a motel or having sex. (R.T. 27-8, 261-64, 273-74, 321).

The complainant testified that when they had stopped at a route familiar to her, the Respondent pulled her toward him, and one of the men from the other vehicle entered her car and proceeded to drive it. She was told that the men needed a car and that she was going to come with them. Respondent told the driver of the car to show her his gun. At her request, however, no weapon was displayed. (R.T. 35, 37, 39, 280).

Shortly thereafter, the two men who had remained in the other vehicle became passengers in the rear seat of the complainant's car. Several stops were made in Norwalk. A fifth companion was picked up. At one stop, the complainant was asked for the key to the trunk of the car, and a wrapped object, later discovered to be a loaded rifle,[8] was placed in the trunk. (R.T. 41-46).

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[8]The discovery was made by the police when the trunk of the car was opened after Respondent and the codefendants had been arrested. (R.T. 10/22/76, 12-14).

The complainant and the men in her car talked intermittently during their ride around Norwalk. The complainant testified that, in response to her request that the men take the car and leave her alone, they replied that she would be given a lot of money and left close to her home at the end of the evening (R.T. 44). On cross-examination, she did not recall that any of the men had said that the car would be returned with a full tank of gas. (R.T. 292). According to the complainant, the men referred to her as "bitch." (R.T. 52, 295). One man, in the back seat, displayed a knife, and his ability to use it was discussed. (R.T. 48-9). She also remembered that Respondent had spoken of his own physical strength and said he had never had a white woman before. (R.T. 50).

The car was subsequently driven onto the Connecticut Turnpike (I-95) in an easterly direction. The complainant, who was in the front seat between the driver and the Respondent, said she did not attempt to secure help at toll stations because she had been threatened. (R.T. 63-5). Cross-examination established that, at some point on the turnpike, the car became stuck in a snowbank. The complainant did not remember whether some or all of the men got out to push although she had a recollection that, when the car was being pushed, she was driving it. (R.T. 295-97, 299-307).

At New Haven, the car was driven from the turnpike to an apartment building in a housing project. (R.T. 67, 558-559). The complainant testified that she was sexually assaulted by each of the five men in a common lavatory on the first floor of the building.[9] (R.T. 74-9, 323-27).

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[9]The Respondent's conviction of sexual assault is not an issue before this Court. At the trial, however, the Respondent did not concede that the sexual acts were nonconsensual. The complainant denied that she had said, "Okay I will give all of them some pussy." (R.T. 323). The doctor

*(continued)*

The complainant was returned to the car, and the Respondent tied her hands in front of her body with a piece of telephone cord. Respondent told another man to tie her feet with a piece of rope, but the attempt was unsuccessful, and the rope was thrown out of the car. (R.T. 81-2, 328). At this time, Respondent told her that she was going to be left with a dime someplace near a telephone booth so that she could call her house, as they needed time to get away with the car. (R.T. 82-3, 333).

According to the complainant, Respondent gave directions to the driver of the car while they were in New Haven and directed that the car be stopped after a bridge was crossed. She did not know where she was and referred to the location as a secluded one. (R.T. 65, 68, 83, 321). The bridge, in fact, was located in a semi-urban area, as the description provided by officers from the New Haven and West Haven Police Departments indicated.[10]

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*(footnote continued from preceding page)*

who examined the complainant at the hospital on December 21, 1975, testified that she had admitted to sexual relations with her boyfriend the previous morning and that the sperm observed by the gynecological test could have come from that event. (R.T. 524-25). No stains from semen were found on Respondent's clothing by an analyst from the F.B.I. laboratory. Positive identifications of seminal stains were made on the blue jeans of one codefendant. Possible seminal stains were found on the garments worn by the remaining three codefendants and the complainant. (R.T. 871-75, 880).

[10]The bridge crosses a stream known as West River at the New Haven-West Haven townline. It connects a roadway with a parallel sidewalk, which is called Washington Avenue in New Haven and Spring Street in West Haven. From the bridge, Washington Avenue proceeds easterly past a ball field and an intersecting street into an inhabited area approximately 400 yards away. On the West Haven side, there is marshland, and the closest intersection is 800-900 yards away. Illumination at the bridge is provided by a street light located at each end. (R.T. 533-35, 586-89, 605).

The complainant testified that when the car stopped, Respondent pulled her out and ran with her across the bridge. He stopped about midway. There was a struggle, and, in her words, he threw her over the side while he was yelling to the men in the car and calling her a "bitch." (R.T. 83-5). She landed on a large pipe that, according to a police officer, was five feet below the roadway or top of the bridge. When she saw him climbing over the side, she jumped into the water at the edge of the stream, which was about two feet deep. (R.T. 85-6, 587).

As the complainant walked away from the water, she saw that Respondent had come to the side of the bridge. She retreated to deeper water and swam under water until she surfaced beneath the bridge, where she untied her hands and discarded the telephone cord. (R.T. 86-9). While under the bridge, she heard voices shouting, back and forth, "Have you seen her?" and "Is she over there?". (R.T. 89).

The complainant waited under the bridge until she became too cold[11] and then returned to the road. The tail lights of a parked car were visible to the west. She ran in an easterly direction across the bridge toward nearby houses. (R.T. 90). Shortly after 4:00 a.m., she was admitted into a house approximately four hundred yards from the bridge, when the occupants heard her moan at their door.[12] (R.T. 370, 376-78, 390).

The police were notified, and two New Haven officers

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[11]For the period between midnight and 4:30 a.m. on December 21, 1975, the United States National Weather Service at the Bridgeport Airport had computed a temperature range of approximately 23-28 degrees for the air and 46 degrees for the water. The wind chill factor was computed to be ten degrees below zero. (R.T. 10/22/76, 34-9).

[12]The residents testified that they heard the complainant say "Please let me in . . . They were trying to kill me." (R.T. 390).

questioned the complainant before she was taken to the hospital. (R.T. 416, 424). From the information received, Respondent and the four codefendants were arrested in Norwalk on December 21, 1975, between 5:00 and 6:00 a.m. while they were in or near the complainant's car. (R.T. 422, 632-33, 648).

Two days later, the complainant identified photographs of Respondent and the four codefendants at the home of her parents. She identified photographs at the trial, and she also identified Respondent in the courtroom. (R.T. 199-203, 209-13).

### B. The Jury Charge And Its Interpretation By The Supreme Court of Connecticut

The trial court's charge consisted of general instructions on applicable principles of law, including a general instruction on intent, and specific instructions on the elements of each crime. (These components will hereinafter be referred to as the "general instructions" and the "specific instructions," respectively.) The conclusive presumption in question was given twice. It was initially stated in the general instructions, which the trial court described as "general comments and principles which form a part of every charge." It was repeated in the specific instructions concerning the elements of attempted murder. (J.A. 23A, 25A).

#### 1. The General Instructions

The general instructions included explanations of the presumption of innocence, the burden of the state to prove every element of each crime beyond a reasonable doubt, the

credibility of witnesses, the concepts of consciousness of guilt and motive, the meaning and use of circumstantial evidence and the ability of the jury to draw reasonable and logical inferences from the facts established in the case. (J.A. 16A-24A). The general instructions further described the different functions of the court and jury and the manner in which the element of intent was to be ascertained. (J.A. 13A-14A, 22A-23A). These latter instructions are of crucial importance in this case.

At the commencement of its charge, the trial court said that it had the duty to state the rules of law involved in the decision of the case and the jury had the duty to find the facts. The jury was told of its obligation to accept the court's pronouncements of law. The court described its function with a further statement that, "Thus, the performance of my duty requires that I state the rules of law lying at the foundation of the various contentions of the Defendant and the State, and the rules which, when applied to the facts that you find will lead to your ultimate verdict of guilt or innocence."[13] (J.A. 14A)

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[13]The following language was used in explanation of the different roles of the court and jury:

'Ladies and gentlemen, it now becomes my duty to instruct you concerning the law which is applicable to the facts in this case. In doing so, I shall be obliged to restate general comments and principles which form a necessary part of every charge even though some of you may have heard them before.

In this case, as in all cases, you as the jury and I as the Court have separate functions. It is my duty to state the rules of law involved in the decision of the case and it is your duty to find the facts. And in this respect, you are the sole judges of what the facts are. Insofar as I state the law to you, what I say is binding upon you, and it is your duty to follow such instructions.

If, by chance, you have a different idea of what the law is, perhaps what it should be, you must disregard your notions and conscientiously apply the law as I state it to you. In addition, if the

*(continued)*

Immediately after it explained the use of direct and circumstantial evidence and before its explanation of consciousness of guilt, the trial court gave its instruction concerning intent.

> One of the elements common to each of the four charges in the Information is intent. And I will discuss this in more detail as I explain the elements of each offense to you. However, the question of intent should cause you no great concern because intent is a question of fact that is solely within your province as jurors. However, you should be aware of a rule of law that will be helpful to you and that is that a person's intent may be inferred from his conduct and every person is conclusively presumed to intend the natural and necessary consequences of his act.

(J.A. 22A-23A).

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*(footnote continued from preceding page)*

law, as I give it to you, differs in any way from the claims made by counsel in argument, then you will dismiss from your minds what they have said to you about the law which is contrary to what I tell you that it is.

Thus, the performance of my duty requires that I state the rules of law lying at the foundation of the various contentions of the Defendant and the State, and the rules which, when applied to the facts that you find, will lead to your ultimate verdict of guilt or innocence.

In the performance of this duty, it may be necessary that I point out to you the legal effect of certain facts or certain evidence or that I suggest to you certain considerations which you should bear in mind in considering the evidence. Where I assume either of these things, you will heed carefully what I say. As to the questions of fact, you, the jury, are to determine what the facts are by a careful consideration of all the evidence and solely upon the evidence giving to each part of the evidence the weight you consider it deserves in reaching the ultimate conclusion of guilt or innocence."

(J.A. 13A-14A).

As the Supreme Court of Connecticut observed, this presumption of intent was stated *expressly* as a conclusive presumption. Based on an analysis of the entire general instructions, the court concluded there could be no serious question as to how the jury, in fact, could have interpreted the presumption. The remaining general instructions were described as "precise, elaborate and cast in highly permissive terms," but the court determined that they were insufficient to prevent the jury from interpreting the presumption exactly as it had been expressed. (J.A. 62A-63A).

### 2. The Specific Instructions

The decision of the Supreme Court of Connecticut that two of Respondent's convictions should be reversed was based on the specific instructions as well as on the general instructions.[14] The court assessed the impact of the presump-

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[14]The court said:

> The conclusion that the trial court's general instructions were erroneous under the rule of *Sandstrom* does not, however, dispose of the defendant's claim of error because it is still necessary to consider the impact of the erroneous general instructions on the specific instructions given on each count. Although the general instructions would normally be incorporated, where applicable, in the court's specific instructions, the actual instructions on each count must be examined to determine whether the *Sandstrom* error in the general instructions were repeated, incorporated or possibly cured by the specific language used.

(J.A. 63A).

*State v. Truppi*, Conn. L.J. No. 25 p. 1, 438 A.2d 712 (1980) *cert. denied*, 451 U.S. 941 (1981), was cited as authority for this procedure. In *Truppi*, *supra*, at 2 n. 1, the court had stated "The placement of this general instruction [on the element of intent] before the instructions relating to the crimes charged in the information indicated to the jury that this instruction applied whenever the later instructions mentioned intent."

tion by making a painstaking comparison between the general instructions and the specific instructions on intent which appeared in the explanation of the elements of each crime. (J.A. 62A-67A).

On this analysis, the kidnapping conviction was affirmed. The error caused by the conclusive presumption contained in the general instruction was considered to have been "cured," as to the kidnapping count, by a specific instruction which specifically described how the element of intent for this crime was to be inferred.[15] (J.A. 28A, 64A). The erroneous conclusive presumption was also held not to have affected the conviction of sexual assault in the first degree where, under state law, proof of only a general intent is required. (J.A. 67A, 70A, n.1, 2).

With respect to the conviction of attempted murder, however, a reversal was required. The specific instruction on the element of intent for this crime not only repeated the language of the general instruction but managed to make it even more onerous.

> Now, no one can look into a man's mind and see what his intention is. The only way to decide that question is to infer from the accused's conduct in the light of surrounding circumstances. But as previously stated, every person is conclusively presumed to intend the natural and necessary consequences of his act.

(J.A. 25A, 63A-64A).[16]

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[15]*See* n.4, *supra*.

[16]The complete specific instructions on the elements of attempted murder were as follows:

> Now this charge is based on a statute which reads in pertinent part as follows: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for the commission of the crime he intentionally does or omits to do anything which, under the circumstances [as] he believes them to be [is] an act or omission constituting a substantial step in a course of conduct planned to culminate in

*(continued)*

A reversal also was required for the conviction of robbery in the first degree because the specific instructions for that crime did not state how the element of intent was to be ascertained. (J.A. 33A-40A). The Supreme Court of Connecticut surmised that the jury "probably" considered the immediately preceding "inference" language of the specific

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his commission of the crime. Conduct shall not be held to constitute a substantial step unless it is strongly corroborative of the actor's criminal purpose."

The first element then which the State must prove beyond a reasonable doubt to sustain a conviction of the accused on this charge is that he has the specific intent to commit murder. And this requires that the crime of murder be explained to you.

A person commits a murder when, with intent to cause the death of another person, he causes the death of such person. Therefore, on this phase of the case, the first question you must ask is this: What intention did the Defendant have in mind? Did he alone or participating with others intend to commit the crime of murder? Did he alone or participating with others intend to cause the death of [the complainant]?

Now, no one can look into a man's mind and see what his intention is. The only way to decide that question is to infer from the accused's conduct in the light of the surrounding circumstances. But as previously stated, every person is conclusively presumed to intend the natural and necessary consequences of his act.

The State has offered evidence concerning a Defendant's conduct towards [the complainant] at the bridge and suggests that by his actions he intended to murder her. Of course, you as jurors may believe or disbelieve all or any part of [the complainant's] testimony in this regard as you deem proper. If you believe her version as to the Defendant's conduct at the bridge, you may presume he intended what would be the natural and necessary consequences of his actions, under the prevailing circumstances and conditions; for example, the temperature of air and water and the force used against her person.

If, upon all the evidence, you conclude beyond a reasonable doubt that the Defendant had formed in his mind the intention to cause death of [the complainant], your next question is whether he intentionally did or omitted to do anything which, under the circumstances, as he believed them to be, was an act or omission

*(continued)*

kidnapping instruction. But this hypothesis could not rise above the level of conjecture. No assumption could be made that the jury did not apply the conclusive presumption of intent expressly stated in the general instructions and repeated in the specific instructions on the elements of attempted murder. (J.A. 65A-67A).

## HOW THE CONSTITUTIONAL QUESTION WAS RAISED AND DECIDED BELOW

At the trial, Respondent did not take any exceptions to the court's charge to the jury. While Respondent's direct appeal was pending, this Court announced its decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979). On the basis of *Sandstrom*, Respondent raised the issue of constitutional infirmity in the jury instructions for the first time by including it in an amended preliminary statement of issues. (J.A. 55A).

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constituting a substantial step in a course of conduct planned to culminate in her death. And a person acts intentionally with respect to a result or to conduct when his conscious objective is to cause such result or to engage in such conduct.

You have heard the evidence concerning the Defendant's conduct on the night in question. It is for you to determine on the evidence whether the State has proved beyond a reasonable doubt first that Mr. Johnson intended to cause the death of [the complainant], and second was that with that intent he intentionally did anything which, under the circumstances as he believed them to be, was an act constituting a substantial step in a course of conduct planned to culminate in her death.

If you find that the State has proved each of these elements beyond a reasonable doubt, you must find the Defendant guilty of criminal attempt to commit murder. If you do not find the State has proved each of these elements beyond a reasonable doubt, then you must find him not guilty on this first count.

(J.A. 24A-26A).

The Supreme Court of Connecticut accepted the issue, despite the lack of an exception, under its "exceptional circumstances" rule enunciated in *State v. Evans*, 165 Conn. 61, 69-70, 327 A.2d 576 (1973). (J.A. 59A). The decision of the Supreme Court of Connecticut was that the jury instructions contravened *Sandstrom v. Montana*, *supra*, because they contained an express conclusive presumption of intent. (J.A. 63A). Reversals were therefore required for Respondent's convictions of attempted murder and robbery in the first degree, and a new trial was ordered on these charges. (J.A. 63A-64A, 65A-67A). The Supreme Court of Connecticut concluded, however, that Respondent's convictions of kidnapping in the second degree and sexual assault in the first degree were not affected by the instructional error, and these convictions were affirmed. (J.A. 64A-65A, 67A).

## SUMMARY OF ARGUMENT

I. The instructional error involved in this case is a violation of an entirely different quality from those instances of evidentiary error that have provided this Court with occasions to apply the harmless error rule of *Chapman v. California*, 386 U.S. 18 (1967). Petitioner concedes that the instruction violated the constitutional principles of *Sandstrom v. Montana*, 442 U.S. 510 (1979). However, in claiming that the error was harmless under *Chapman*, because of the purportedly overwhelming evidence of Respondent's guilt, Petitioner ignores the fundamental differences between evidentiary and instructional error.

An evidentiary error admits improper material for the jury's factual considerations and may be cured, rebutted, or rendered harmless in the process of the trial itself. *See Sparf*

*v. United States*, 156 U.S. 51, 103 (1895). An instructional error can never be cured by evidence. It is the duty of juries to take the law from the court. *Id.* at 102. The only satisfactory cure that can be supplied for an instructional error is other language in the charge, as in *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); and *Boyd v. United States*, 271 U.S. 104, 107 (1926).

Under *Chapman*, the criterion to be used in ascertaining harmlessness is the absence of a reasonable possibility that the error might have contributed to the conviction. The fundamental distinction between evidentiary and instructional error requires the use of different approaches in deciding whether this possibility exists.

When the error is the use of impermissible evidence, the reviewing court is able to isolate the tainted item, in its own reading of the record, and assess what impact that item might have had on the minds of the average jury. *Schneble v. Florida*, 405 U.S. 427, 432 (1972). When the error involves an erroneous instruction, however, this instruction must be assumed to have had an impact upon the jury. A crucial assumption underlying the constitutional system of trial by jury is that juries will follow the instructions given them. *Parker v. Randolph*, 442 U.S. 62, 73 (1979).

Given the foregoing assumption, fundamental to our system of justice, the role of an appellate court is necessarily different in cases of instructional error than in cases of evidentiary error. When instructional error is involved, the appropriate appellate question "is not whether guilt may be spelt out of a record but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

II. Petitioner has misinterpreted this Court's remand in

*Sandstrom v. Montana*. That remand did not "invite" a procedure whereby any instruction that violated the requirements of *Sandstrom* must undergo a determination of harmlessness by a review of the evidence. *Sandstrom* simply declined to reach the issue of harmless error as an initial matter because the question had not been presented to nor considered by the Supreme Court of Montana. The remand was thus an example of this Court's consistent policy not to formulate a rule of constitutional law that is broader than necessary for the decision of the case at hand. *See Jackson v. Virginia*, 443 U.S. 307, 327 (1979) (Stevens, J., concurring).

In any event, the remand in *Sandstrom* should not control the disposition of the instant case given the profound differences in the instructions at issue. The instruction at issue in *Sandstrom* could have been interpreted as containing either a conclusive or burden-shifting presumption of intent. The parties in that case had, however, treated the instruction only as a burden-shifting one. In contrast, the instruction in this case presents an unambiguous conclusive presumption of intent that is similar to the instruction in *United States v. United States Gypsum Co.*, 432 U.S. 422 (1978). *Gypsum* emphasized that "A conclusive presumption [of intent] which testimony could not overthrow would effectively eliminate intent as an element of the offense." 432 U.S. at 446. No review could render the instruction in *Gypsum* harmless. Consequently, no remand was ordered.

III. *In re Winship*, 397 U.S. 358, 364 (1970), removed any doubt that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

*Sandstrom v. Montana* demonstrated this Court's height-

ened concern that jurors might depart from the due process requirement of *Winship* when provided with the deductive logic of a presumption. A two-pronged threshold inquiry was used. First, the nature of the presumption was ascertained from the words actually used in the instructions. The Court then inquired whether the instruction, as it could have been interpreted by the jury, was constitutional.

The possibility of an unconstitutional interpretation in *Sandstrom* stemmed from the unexplained use of the word "presume," whose common meaning is "to suppose to be true without proof." In the instant case, the jury almost certainly interpreted its instruction as a conclusive presumption. Nowhere in the charge did the trial court ever explain the meaning of "presume" as it related to the elements of the offenses. The common meaning of presume was further enhanced by the court's use of the modifier "conclusively," whose common meaning, in adjectival form is "decisive," "final," and "putting an end to debate especially by reason of irrefutability." *Sandstrom* emphasized that such a conclusive presumption of intent "would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] fact finding function' which in a criminal case the law assigns solely to the jury." 442 U.S. at 523.

The question of whether the jury could have interpreted the instruction in this case as a direction to find the requisite intent once Respondent's acts and their natural consequences were established can only be answered by examining the charge. Contrary to Petitioner's assertion, the words "presume" and "infer" were not used interchangeably. The "presumption" was posited as a "rule of law"; "inferences" were described as factual conclusions which the jury could

reach in its discretion. Regardless of what definitional relationship between the two concepts is assumed, the jury would have been compelled to accept the rules of law that the court stated were binding and obligatory.

In order to nullify the effect of the erroneous instruction, the remainder of the charge would have to be so inconsistent with it that a reviewing court could be certain that a reasonable jury understood the difference and was able to disregard the error. As *Sandstrom* explains, however, the necessary "rhetorical inconsistency" cannot be provided by general instructions on the presumption of innocence and the burden of the state to prove guilt beyond a reasonable doubt. And, in the instructions at issue here, it is evident that the "inference" terminology in the kidnapping instructions did not nullify the conclusive presumption of intent contained in the general instructions and repeated even more explicitly in the specific instructions on attempted murder.

IV. *Sandstrom v. Montana* stands at the head of two lines of decisions emanating from the due process requirements of *In re Winship*. One line of cases prohibits shifting the burden of persuasion to the defendant on any element of the crime. The other line prohibits directing the jury to find an element of the crime or the failure to submit all elements for the jury's factual determination. This latter prohibition is similar to a trial court's inability to direct a verdict of guilty in a criminal case.

It is a hallmark of our legal system—and one of the principal distinctions between civil and criminal trials—that a court has no power to direct a verdict of guilty "regardless of how overwhelmingly the evidence may point in that direction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977). A conclusive presumption of intent is functionally indistinguishable from a directed verdict on that element of the offense.

This Court has consistently denounced conclusive presumptions of intent as being wholly irreconciable with the fundamental requirements of fairness and due process in our criminal justice system. In *Morissette v. United States*, 342 U.S. 246, 275 (1952), this Court reasoned that such a presumption conflicts "with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." In *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978), it explained that such a presumption invades the "fact-finding function" of the jury. And, in *Sandstrom*, this Court reiterated that such a presumption deprives a defendant "of his constitutional rights as explicated in *Winship*." 442 U.S. at 523. These are constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.

V. Even if the instructional error was not harmful *per se*, it cannot be held harmless beyond a reasonable doubt on the facts of this case. A finding of intent was far from a foregone conclusion. Particularly with respect to the attempted murder charge, the events described by the complainant were sufficiently ambiguous to cast doubt on whether Respondent had the requisite intent to kill. The fact that Respondent told the complainant that she would be left with a dime near a telephone booth, the fact that the incident on the bridge could be construed as spontaneous, the fact that the bridge was in a somewhat populated area, and the fact that the complainant later heard voices searching for her all becloud the inquiry as to whether an intent to kill existed. That fact simply cannot be ascertained with certainty on the basis of the record. There is, consequently, a reasonable possibility that the trial court's instructions tipped the scales of justice in fact. The decision of the Supreme Court of Connecticut was thus compelled by *Chapman v. California*.

## ARGUMENT

### I. INSTRUCTIONAL ERROR, UNLIKE EVIDENTIARY ERROR, CANNOT BE CURED BY THE PRODUCTION OF EVIDENCE

#### A. THE FUNDAMENTAL DIFFERENCES BETWEEN EVIDENTIARY AND INSTRUCTIONAL ERROR

The error involved in this case is instructional error, a violation of an entirely different quality than the instances of evidentiary error that have hitherto provided this Court with occasion to apply the harmless error rule of *Chapman v. California*, 386 U.S. 18 (1967). *See, e.g., Milton v. Wainwright*, 407 U.S. 731 (1972); *Harrington v. California*, 395 U.S 250 (1969). It is also of a different nature from the error involved in *Chapman* itself, where the violation consisted of prosecutorial and judicial comment upon the failure of the defendants to testify and rebut the evidence against them.[17]

It is important to note at the outset that Petitioner does not challenge the conclusion of the Supreme Court of Connecticut that the trial court's instruction, informing the jury

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[17]The California constitutional provision and practice that permitted prosecutorial and judicial comment upon a defendant's failure to testify were held to be unconstitutional as a penalty on the exercise of the privilege against self-incrimination in *Griffin v. California*, 380 U.S. 609 (1965), decided while the petitioners' convictions were on direct appeal.

of a "rule of law" that "every person is conclusively presumed to intend the natural and necessary consequences of his act" (J.A. 23A, 25A), violated the constitutional principles announced by this Court in *Sandstrom v. Montana*, 442 U.S. 510 (1979).[18] Petitioner contends, rather, that the conceded instructional error was harmless beyond a reasonable doubt because of the purportedly overwhelming evidence of Respondent's guilt. Petitioner consequently claims that the Supreme Court of Connecticut was obliged by *Chapman v. California* to review that evidence before making its decision that the erroneous instruction required the reversal of two of Respondent's four convictions.

Petitioner implies that this Court's decisions, in *Milton v. Wainwright, supra*; *Schneble v. Florida*, 405 U.S. 427 (1972); and *Harrington v. California, supra* (cases involving the impermissible use of evidence) suggest that the focus of the *Chapman* rule has changed so that it is now exclusively oriented to the likely result of an error-free trial. Petitioner, therefore, suggests that in all instances of instructional as well as evidentiary error, the appropriate question to ask is whether the jury would have reached the same result had the erroneous instruction not been given.

*Chapman*, itself, expressly focuses on whether the constitutional error in question "affects 'substantial rights' of a party," 386 U.S. at 23, rather than on whether, aside from the violation, itself, sufficient evidence has been presented for the jury to convict. The opinion of the Court is, in fact,

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[18]Although the petitioner is not before this Court to challenge or relitigate the Connecticut Supreme Court's conclusion that the presumption instructions violated *Sandstrom*, since the instructions should be examined in the context of the entire charge and the trial record to determine whether they contributed to the respondent's conviction, it is helpful to review that court's analysis.

(Brief of Petitioner at 31-32).

conspicuously devoid of any detailed discussion of the evidence presented to the jury in that case—apart from a conclusory statement that an acquittal might have resulted had "the constitutionally forbidden comments" not been given. *Id.* at 25-6. The Court's decision plainly turned on the "machine-gun repetition of a denial of constitutional rights" resulting from those comments. The Court's holding was posited in terms of its earlier statement in *Fahy v. Connecticut*, 375 U.S. 85, 86-7 (1963) (involving the admission of illegally seized evidence),[19] that

> We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

The issue in the instant case is not the much-debated one of whether *Milton v. Wainwright, supra*; *Schneble v. Florida, supra*; and *Harrington v. California, supra* are faithful adherents to the *Chapman* rule.[20] The only relevance of those decisions to this case is Petitioner's insistence that the method of review used by the Court in determining whether the evidentiary errors at issue in those cases were harmless beyond a reasonable doubt must be used to determine the harmlessness of an error in a trial court's instructions to the jury.

The contention that the same method of review should be mechanically applied in both situations ignores the funda-

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[19]The use of illegally seized evidence in state courts was prohibited by *Mapp v. Ohio*, 367 U.S. 643 (1961), while Fahy's case was pending on direct review.

[20]*See* Saltzburg, *The Harm Of Harmless Error*, 59 Va. L. Rev. 988, 1013-1018 (1973); Note, *Harmless Error: The Need For A Uniform Standard*, 53 St. John's L. Rev. 541, 548 (1979).

mental differences between evidentiary and instructional error. An evidentiary error admits improper material for the jury's factual considerations. That material may be stricken or it may be adequately rebutted or rendered harmless in the process of the trial itself. *See Sparf v. United States*, 156 U.S. 51, 103 (1895). An instructional error, however, can never be cured by evidence. "[I]t is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence." *Id.* at 102.

An instructional error may, of course, be cured by other portions of the charge. A single instruction is not to be judged in artificial isolation but must be considered in the context of the entire charge. *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *Boyd v. United States*, 271 U.S. 104, 107 (1926). But, this is the *only* satisfactory cure for an instructional error. Just as "a judge may not direct a verdict of guilty no matter how conclusive the evidence," *United Brotherhood Of Carpenters v. United States*, 330 U.S. 395, 408 91947), no quantum of evidence can conceivably allow a judge to give an erroneous instruction.

This inherent distinction between evidentiary and instructional error requires the use of different approaches in ascertaining the harm resulting from these errors.

## B. THE TWO STANDARDS OF REVIEW

### 1. THE METHOD OF REVIEW WHEN THE ERROR IS EVIDENTIARY

When the error involves the use of impermissible evidence, the reviewing court decides whether the error was harmless beyond a reasonable doubt by isolating the tainted

item, in its own reading of the record, and by making a determination of what it perceives to have been the impact of the tainted item on the minds of the average jury. *Schneble v. Florida, supra*, 405 U.S. at 432.

*Harrington v. California, supra*, is an example of this method of review. The Court, in that case, determined that the violation of the petitioner's right to confront witnesses, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968), was harmless beyond a reasonable doubt. The violation was caused by the introduction of the confessions of two codefendants who did not testify. The Court reasoned that this violation was harmless in view of the other evidence presented at the petitioner's felony murder trial, including testimony from a third codefendant that placed the petitioner at the scene of the crime with a gun and the statements of the petitioner, himself, admitting his presence at the scene and describing his subsequent flight.

The same approach was used in *Schneble v. Florida, supra*, where the error was an arguable *Bruton* violation created by the introduction of the statement of a nontestifying codefendant. The statement in question, however, had a "relatively" insignificant impact given the petitioner's own "comprehensive" confession, which was "minutely detailed" and completely consistent with the objective evidence. 405 U.S. at 429-430.

In *Milton v. Wainwright, supra*, the claim was that the petitioner's Fifth and Sixth Amendment rights had been violated by the introduction of a confession obtained surreptitiously by a policeman who posed as the petitioner's cellmate after judicial proceedings had commenced and counsel had been retained. Without reaching the merits of the petitioner's complaints, this Court concluded that the putative error was harmless because the tainted confession had been preceded by three previous confessions that had been properly received in evidence.

It is important to note that the evidentiary errors in each of these cases were rendered harmless by concededly admissible inculpatory statements (and, in *Milton* and *Schneble*, outright-confessions) made by the defendants. This is, obviously, a somewhat unusual circumstance that does not occur in the instant case. In any event, these cases do not purport to discuss the quite different problem posed by an erroneous instruction that necessarily alters the jury's consideration of the entire case. Fortunately, other decisions of this Court have furnished the necessary guide-posts to which we must refer in considering this issue.

## 2. THE METHOD OF REVIEW WHEN THE ERROR IS INSTRUCTIONAL

When the error involves an erroneous instruction, this instruction must be assumed to have had an impact upon the jury.

> A crucial assumption underlying [the] system [of trial by jury contemplated by the Constitution] is that juries will follow the instruction given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.

*Parker v. Randolph*, 442 U.S. 62, 73 (1979).[21]

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[21]Roger Traynor, the former Chief Justice of the Supreme Court of California, wrote in his seminal book, *The Riddle Of Harmless Error*, that, "A common assumption is that a jury understands and faithfully follows the court's instructions. Under this assumption any substantial error in the instruction is bound to influence the jury and calls for reversal," R. Traynor, *The Riddle Of Harmless Error* 73 (1970). Traynor's views on this subject are entitled to weight not only because of his general stature, but also, because this Court's per curiam decision in *Ross v. California*, 391 U.S. 470 (1968), was doubtlessly influenced by Traynor's scholarly discussion of the harmless error doctrine in his dissent below. *See People v. Ross*, 67 Cal. 2d 64, 60 Cal. Rptr. 254, 429 P.2d 606, 615-22 (1967).

Given this assumption, fundamental to our system of justice, the role of an appellate court is necessarily different in cases of instructional error than in cases of evidentiary error. As this Court observed in *Weiler v. United States*, 323 U.S. 606, 611 (1945), a case involving instructional error,

> We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility.

The appropriate appellate question in such cases "is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." *Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

*Kotteokos v. United States*, 328 U.S. 750 (1946), upon which Petitioner relies, is not authority to the contrary. That case's intimation that some instructional errors may "conceivably" be rendered harmless by evidence, 328 U.S. at 763, was expressly qualified by the proviso, "except perhaps where the departure is from a constitutional norm or a specific command of Congress." *Id.* at 764-65.[22] A departure

[22] *Bihn v. United States*, 328 U.S. 633 (1946), decided the same day as *Kotteokos*, makes it clear that the Court did not intend its intimation in *Kotteokos* to be an expansive one. *Bihn* squarely rejected the Government's invitation to find harmless the instructional error involved in that case. The Court focused on the facts that "the probabilities of confusion in the minds of the jurors seem go great, and the charge was so important to the vital issue in the case" in finding that the instruction was indeed prejudicial. 328 U.S. at 638. This language strongly suggests that the *Kotteokos* Court did not intend to imply that instructional errors like that involved in the instant case can ever be harmless.

"from a constitutional norm" is, of course, precisely what is involved in this case. The relevant constitutional norm is provided by *In re Winship*, 397 U.S. 358, 364 (1970). The stated reason for the partial reversals ordered by the Supreme Court of Connecticut was that the trial court's instruction included a conclusive presumption of intent that withdrew that element of the crimes from the factfinding process of the jury. *See United States v. United States Gypsum Co*, 438 U.S. 422, 435, 446 (1978).

## II. THIS COURT'S REMAND IN *SANDSTROM v. MONTANA* DOES NOT IMPLY THAT A CONCLUSIVE PRESUMPTION LIKE THAT INVOLVED IN THIS CASE MAY EVER BE CONSIDERED HARMLESS

Petitioner assumes that this Court by its remand in *Sandstrom v. Montana, supra*, 442 U.S. at 526-27, has "invited" a procedure whereby any instruction that violates the requirements of that case must undergo a determination of harmlessness by a review of the evidence presented at the trial. Brief of Petitioner at 20. This assumption is unfounded. The *Sandstrom* remand constituted no such "invitation." As this Court carefully noted, the issue of harmless error had not even been considered by the Supreme Court of Montana in that case, and this Court simply declined "to reach [it] as an initial matter here." *Id.* at 527. At the risk of stating the obvious, actions such as these do not constitute "invitations." Such actions do no more than follow the wise and well-settled jurisprudential rule that this Court will not anticipate a question of law in advance of the necessity of

deciding it and will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *See Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). This rule was recently restated by Mr. Justice Stevens in his concurring opinion in *Jackson v. Virginia*, 443 U.S. 307, 327 (1979), when he noted that "constitutional lawmaking efforts" cannot be justified unless they "are necessary to the decision of the case at hand." *See also Carter v. Kentucky*, 450 U.S. 288, 304 (1981).[23]

In any event, the remand in *Sandstrom* should in no way control the disposition of the instant case given the profound differences in the instruction at issue. The instruction in *Sandstrom*, *supra*, 442 U.S. at 513, "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," was ambiguous. This Court concluded that it was susceptible to interpretation by a reasonable jury as either a conclusive or a burden-shifting presumption of the element of intent. *Id.* at 517. The parties in that case had,

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[23]The error in *Carter* was the refusal of the trial court to instruct, as requested, that, "The [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." The state contended for the first time before this Court that, because the evidence of the petitioner's guilt was "overwhelming and could not be explained," any constitutional error committed by the trial court was harmless, *Chapman v. California*, 386 U.S. 18. In response to this belated claim, this Court stated that:

> While it is arguable that a refusal to give an instruction similar to the one requested here can never be harmless, *cf. Bruno* [*v. United States*, 308 U.S.] at 293, we decline to reach the issue because it was not presented to or considered by the Supreme Court of Kentucky. *See Sandstrom v. Montana*, 412 U.S. 510, 527.

450 U.S. at 304.

however, treated the instruction only as a burden-shifting one.[24]

This case, in contrast, involves an unambiguous conclusive presumption of intent. The disposition of *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), involving a similarly unequivocal conclusive presumption of intent is instructive on this point. *Gypsum* emphasized that, "A conclusive presumption [of intent] which testimony could not overthrow would effectively eliminate intent as an element of the offense." 438 U.S. at 446. No review of the evidence could render the instruction harmless, and, consequently no remand was ordered.

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[24]At the trial, Sandstrom's attorney had objected to the instruction on the ground that "[it] has the effect of shifting the burden of proof on the issue of" purpose or knowledge to the defense and "that is impermissible under the Federal Constitution, due process of law." 442 U.S. at 513. The (belated) claim of the state before this Court was that even if the jury relied upon the unconstitutional instruction, the error was harmless under *Chapman v. California*, 386 U.S. 18, because both the petitioner's confession and the testimony of the psychiatrist demonstrated that the petitioner possessed the requisite intent. *Id.* at 526. On remand, the Supreme Court of Montana concluded that, in considering the instruction and the fact that intent was the main issue at the trial, it could not conclude that the instruction was harmless. "The instruction goes to a vital element of the proof of the crime, namely the intent of the defendant Sandstrom in committing the homicide. If the jury followed the instruction, it could have presumed the intent without proof beyond a reasonable doubt." *State v. Sandstrom*, 603 P.2d 244, 245 (Mont. 1979). The decision of the Supreme Court of Montana, on remand, has been interpreted as that court's agreement that the erroneous instruction "unconstitutionally shifted the burden of proving the intent element of the crime from the state to the defendant." *McKenzie v. Montana*, 449 U.S. 1050, 1052 (1980) (Marshall, J., dissenting from denial of certiorari). *See also Jacks v. Duckworth*, 651 F.2d 480, 492-93 (7th Cir. 1981) (Swygert, J., dissenting), *cert. denied*, 102 S.Ct. 1010 (1982).

## III. THE TRIAL COURT'S INSTRUCTIONS, STATING A CONCLUSIVE PRESUMPTION OF INTENT, WERE IRRECONCILABLE WITH THE COMMANDS OF *SANDSTROM*

"Although the petitioner is not before this Court to challenge or relitigate the Connecticut Supreme Court's conclusion that the presumption instructions violated *Sandstrom*," Brief of Petitioner at 31-32, Petitioner nevertheless expresses "serious doubt that the trial court gave a true conclusive presumption instruction." *Id.* at 23, 34 n. 21. Further, Petitioner has both parsed and discussed the charge in an effort to demonstrate that the erroneous instruction did not, in the language of *Chapman v. California, supra* at 24, "contribute to the verdict." *Id.* at 9-15, 31-35. A proper response to these contentions must begin with a consideration of the fundamental requirements of due process in criminal trials and the limitation that these requirements place upon the use of presumptions in jury instructions.

The starting point, of course, is the clarion call of *In re Winship, supra*. "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. *Winship* recognized that the standard of proof of guilt beyond a reasonable doubt was one of societal concern. *Id.* This proposition was stated even more emphatically by Mr. Justice Harlan in his concurring opinion.[25] As an essential

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[25]Mr. Justice Harlan wrote that,

> [A] standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he

*(continued)*

part of our system of criminal justice, the constitutional necessity of proof beyond a reasonable doubt can be invoked by defendants whose conduct is culpable as well as by those who are blameless. *Jackson v. Virginia*, *supra*, 443 U.S. at 323.

In *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979), this Court explained the relationship between the due process requirement enunciated in *Winship* and the permissible use of presumptions in criminal trials. The relationship was described in the following terms: "[I]n criminal cases, the ultimate test of any [presumption's] constitutional validity remains constant: the [presumption] must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Id.* at 156.[26]

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*(footnote continued from preceding page)*

> should have in the correctness of his factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

397 U.S. at 370.

[26]Mr. Justice Powell, in his dissenting opinion in *County Court of Ulster County v. Allen*, explained that, "[T]he use of presumptions in criminal cases poses at least two distinct perils for defendants' constitutional rights." In addition to the danger of interference with the factfinder's responsibility to find ultimate facts recognized in the opinion of the Court, there is also a danger to a second due process rule that when a jury is encouraged to make factual inferences, "those inferences must reflect some valid general observation about the natural connection between events as they occur in our society." 442 U.S. at 169-170. A jury instruction limited to a permissive inference of intent from conduct and circumstances unquestionably satisfies this second due process test. *See United States v. United States Gypsum Co.*, *supra*, 438 U.S. at 446; *Sandstrom v. Montana*, *supra*, 442 U.S. at 527 (Rehnquist, J., concurring).

*Allen*, *supra*, at 157-159 n. 16, recognized that even where a presumption is derived from a statute, its validity in a particular case will depend upon the manner in which the effect of the presumption is explained to the jury.[27] The same criterion has been applied to jury instructions that embody presumptions supplied by the common law. *Barnes v. United States*, 412 U.S. 837, 844-45 & n.8 (1973).

In *Sandstrom v. Montana*, this Court manifested a heightened sensitivity that jurors might depart from the due process requirement of proof of guilt beyond a reasonable doubt when provided with the deductive logic of a presumption.[28] The Court used a two-pronged threshold inquiry. First, the nature of the presumption was ascertained from the words actually used in the instructions. The Court then inquired whether the instruction, as it could have been interpreted by a reasonable jury, was constitutional. 442 U.S. at 514.

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[27]This was the situation in *Hammontree v. Phelps*, 605 F.2d 1371 (5th Cir. 1979), where the Louisiana negligent homicide statute provided that "the violation of a statute or ordinance shall be considered only as presumptive evidence of [criminal] negligence" and state decisional law had interpreted the statute as supplying only an inference. The jury instructions in Hammontree's trial, however, erroneously stated that, upon proof that the petitioner had violated speeding and driving while intoxicated statutes, the burden was upon him to disprove criminal negligence. *Id.* at 1379-81.

[28]*Sandstrom*, however, demonstrates the Court's heightened sensitivity to the way a presumptive device sounds to the ear of the juror. This emphasis is appropriate because it is the factfinder who must apply the presumptive device following a typically cursory instruction as to its use, no matter how many volumes of appellate exegesis follow.

Schmolesky, *County Court of Ulster County v. Allen And Sandstrom v. Montana: The Supreme Court Lends An Ear But Turns Its Face*, 33 Rutgers L. Rev. 261, 274 (1981).

The *Sandstrom* jury might have used the instruction in that case as either a conclusive or a burden-shifting presumption. These possibilities stemmed from the unexplained use of the verb "presume," whose common meaning is to "suppose to be true without proof." 442 U.S. at 517. In contrast, the jury in the instant case almost certainly interpreted its instruction as a conclusive presumption. Despite the voluminosity of its charge (J.A. 13A-48A), the trial court never explained the term "presume" as it related to the elements of the offenses. The common meaning of that term was assuredly enhanced by the modifier "conclusively," which, in adjectival form, means "decisive," "final," and "putting an end to debate especially by reason of irrefutability." *Webster's Third International Dictionary* 417 (1971).

*Sandstrom* emphasized that a conclusive presumption of intent "would 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and would 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." 442 U.S. at 523. This Court has, moreover, consistently declined to hold the conclusive presumptions that have come before it to be harmless. *See United States v. United States Gypsum Co., supra* at 435, 446; *Morissette v. United States*, 342 U.S. 246, 274 (1952). The principle announced in these decisions applies with equal force to the instant case despite Petitioner's attempt to distinguish them on the basis of the differences in the crimes involved. Brief of Petitioner at 34 n. 20. This fundamental principle of law is hardly undermined by Petitioner's erroneous claim that the instruction in question

was permitted by Connecticut decisional law prior to *Sandstrom*. Brief of Petitioner at 23, n. 12.[29]

The question of whether the jury, in this case, could have interpreted the instruction as a direction to find the requisite intent once convinced of Respondent's acts and their natural and necessary consequences can only be answered by examining the charge. On the question of the jury's interpretation, this Court is the final authority. *Sandstrom v. Montana*, *supra* at 517.

The instruction was posited as a "rule of law" (J.A. 23A). *Cf. Morissette*, *supra*, 342 U.S. at 274.[30] Contrary to Petitioner's assertion (Brief of Petitioner at 33), the words "presume" and "infer" were not used interchangeably, although both words occur in the instruction. (J.A. 23A, 25A).

"Inferences" were described as factual conclusions which

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[29]In *State v. Ruiz*, 171 Conn. 264, 277, 368 A.2d 222 (1976), the Supreme Court of Connecticut stated that "A person's intention may be inferred from his conduct . . . and every person is conclusively presumed to intend the natural and necessary consequences of his acts." (Citations omitted.) This statement, however, was made in response to a contention that the *evidence*, in that case, was insufficient to sustain a verdict and not in the context of an approved jury instruction. In any event, it has been clear since *In re Winship*, 397 U.S. 358 (1970), that use of conclusive presumptions of intent cannot be reconciled with the requirements of due process.

[30]*Morissette* quoted *People v. Flack*, 125 N.Y. 324, 334, 26 N.E. 267, 270 (1891), on this point:

> However clear the proof may be, or however incontrovertable may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury.

the jury could reach and not as rules of law which only the court could establish. *See, e.g.*, J.A. 14A, 16A. The difference in the two concepts as they were treated in the charge is vividly illustrated by comparing the instructions on the "presumption" of intent and the "inference" of the unexplained possession of recently stolen property. (J.A. 23A, 25A, 36A-37A).[31] Moreover, even if a relationship between the two concepts is assumed, the jury would nevertheless have been compelled to accept the rules of law that the court, at the outset of the charge, had stated were binding and obligatory. (J.A. 14A).

The terms "presumed" and "presumption" were used in three instances in the general instructions. Of course, "presumed" was used in the court's instruction on the presumption of innocence. (J.A. 16A). It was next used when the court described, as a "rule of law," the conclusive presumption of intent. (J.A. 23A). The third use came immediately afterward in the court's explanation on consciousness of guilt. In this instance, the court explained that flight from the scene of a crime did *not* raise a legal "presumption" of guilt. (J.A. 23A). The court's explanation in negative terms, however, could only reinforce the positivity of its preceding statement. *See Cool v. United States*, 409 U.S. 100, 102-03, n.3 (1972).

In order to nullify the effect of this erroneous instruction, the remainder of the charge would have to demonstrate such

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[31] *Compare, e.g.* the specific instruction on attempted murder ("[E]very person is conclusively presumed to intend the natural and necessary consequences of his act.") (J.A. 25A) *with* the specific instruction on robbery in the first degree ("[Y]ou may infer from possession of property recently stolen if unexplained . . . that the possessor stole the property . . . [I]t is *important* to note, also, that the inference is one of fact and may but need not be drawn by you as the trier of fact as you see fit.") (J.A. 36A-37A) (emphasis added).

inconsistency with the portions discussed, *supra*, that a reviewing court could be certain that a reasonable jury understood the difference and was able to disregard the error. This Court decided in *Sandstrom* that the necessary "rhetorical inconsistency" could not be provided by general instructions on the presumption of innocence and the burden of the state to prove guilt beyond a reasonable doubt. The jury could interpret the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied. 442 U.S. at 518-19 n.7.[32]

Petitioner suggests that "rhetorical inconsistency" exists in this case because the trial court used a terminology of "inference" when explaining the intent required for the crime of kidnapping in the second degree. (J.A. 28A). Petitioner's claim is that, in view of the fact that supplementary instructions were given only on the kidnapping charge, the "last word" heard by the jury on the subject of intent was couched in constitutionally permissible terms. Brief of Petitioner at 38 n. 23.

This claim is flawed for several reasons. In the structure of the entire charge, the presumption was expressly stated to apply to *all* of the offenses, and in the specific instructions on

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[32]In *Sandstrom*, where the instruction was considered to have been susceptible to two interpretations, this Court said:

> For example, if the presumption were viewed as conclusive, the jury could have believed that, although intent must be proved beyond a reasonable doubt, proof of the voluntary slaying and its ordinary consequences constituted proof of intent beyond a reasonable doubt. *Cf. Mullaney v. Wilbur*, 421 U.S. 684, 703 n. 31 (1975) ("These procedural devices require (in the case of a presumption) . . . the trier of fact to conclude that the prosecution has metits burden of proof with respect to the presumed . . . fact by having satisfactorily established other facts").

442 U.S. at 518 n. 7.

each of the crimes, the explanation of their respective elements was limited to the offense then being discussed. Because of this inescapable fact, the Supreme Court of Connecticut properly declined to speculate that, for the offense of robbery in the first degree, the jury had adopted the inference language of the kidnapping instruction instead of the conclusive presumption stated in the general instructions and repeated in the specific instructions on attempted murder. (J.A. 65A-67A).

Moreover, on the attempted murder charge, the statute required the ascertainment of two different mental states. (J.A. 24A-25A). The conclusive presumption was directly applied to the first element of intent when the jury was required to find that Respondent possessed the intent to commit the choate crime of murder. The trial court pointedly informed the jury that this element of intent had to be determined first. (J.A. 24A-25A). Thereafter, the jury was to consider whether Respondent intentionally committed acts which constituted a substantial step in a course of conduct planned to culminate in the completion of the (choate) crime. The conclusive presumption also affected the second element of intent when the jury was instructed in the statutory language that "a person acts intentionally with respect to a result or to conduct when his *conscious objective* is to cause such result or to engage in such conduct." (J.A. 25A-26A). (emphasis added).

From a reading of the charge as a whole, *see Boyd v. United States, supra*, 271 U.S. at 107, it is evident that the "inference" terminology in the kidnapping instructions did not nullify the conclusive presumption of intent contained in the general instructions and repeated even more explicitly in the specific instructions on attempted murder. (*See* J.A. 23A, 25A, 28A).

The only arguable "rhetorical inconsistency" involved in this case is that the attempted murder and robbery charges were submitted to the jury on two alternative theories of intent. The "presumption" theory was completely mandatory. Its constitutional invalidity is established by a facial analysis of its provisions irrespective of the status of the evidence in the case. *County Court of Ulster County v. Allen*, *supra*, 442 U.S. at 157-59 & nn. 6, 17; *Barnes v. United States*, *supra*, 412 U.S. at 844-45 & n. 8. And, as this Court has noted on several occasions, when a case is submitted to the jury on alternative theories, the unconstitutionality of any of those theories requires that the conviction be set aside. *See, e.g. Sandstrom v. Montana*, *supra*, 442 U.S. at 526; *Stromberg v. California*, 283 U.S. 359, 369-70 (1931).[33]

[33]In light of these considerations, Petitioner's reliance on *Hamling v. United States*, 418 U.S. 87 (1974), as support for its claim that the instructional error in the instant case was harmless is misplaced. *See* Brief of Petitioner at 17, 22. In *Hamling*, the challenged instruction was concededly proper at the time it was given, and the petitioner sought the benefit of a subsequent change in decisional law that merely cast doubt only upon a portion of the instruction. The express holding of *Hamling*, predicated upon *Boyd v. United States*, *supra*, 271 U.S. at 107, was that "[R]eversal is required only where there is a probability that the excision of the [offending references] would have materially affected the deliberations of the jury." 418 U.S. at 108.

For similar reasons, Petitioner's reliance upon the dissenting opinion of Mr. Chief Justice Burger in *Chiarella v. United States*, 445 U.S. 222 (1980) is also misplaced. The opinion of the Chief Justice that the possibility of instructional error was nonexistent in that case was premised upon his interpretation of the purpose of the relevant statutory and regulatory sections. In the view of the Chief Justice even if the instructions in issue did not define "misappropriation" with sufficient precision, the defect was harmless in view of the admissions of the petitioner that he had appropriated confidential information entrusted to his employer. The harmlessness was underlined by the arguments of the petitioner's counsel that the petitioner did not dispute that he had violated his duty as an agent of his employer's customers not to use their confidential information for his personal profit. *See* 445 U.S. at 240, 244-45.

## IV. A CONCLUSIVE PRESUMPTION OF INTENT CAN NEVER BE HARMLESS BECAUSE IT IS THE FUNCTIONAL EQUIVALENT OF A DIRECTED VERDICT ON THIS ISSUE

*Sandstrom v. Montana* stands at the head of two lines of decisions emanating from the due process requirements of *In re Winship*. One line of cases prohibits shifting the burden of persuasion on any element of the crime. *See Patterson v. New York*, 432 U.S. 197, 206 (1977); *Mullaney v. Wilbur*, *supra* 421 U.S. at 702 (1975). The other line prohibits directing the jury to find an element of the crime or the failure to submit all elements for the jury's factual determination. *See United States v. United States Gypsum Co.*, *supra*, 438 U.S. at 434. This latter prohibition is similar to a trial court's inability to direct a verdict of guilty in a criminal case. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

Petitioner implies that the distinction between those post-*Sandstrom* decisions that have reviewed evidence to determine the harmlessness of instructional error and those decisions that have implied non-harmlessness is merely a difference in policy that this Court should settle. Brief of Petitioner, at 20-21, 23. This is an overly facile assessment of post-*Sandstrom* law. A careful reading of those decisions demonstrates that their varying results have depended primarily upon the language of the particular instructions at issue.

Some instructions have been held not to run afoul of either of *Sandstrom*'s prohibitions.[34] Lower courts have only

[34] *E.g. United States v. Wolters*, 656 F.2d 523, 525-26 (9th Cir. 1981); *Jacks v. Duckworth*, 621 F.2d 480, 485-86 (1981), *cert. denied*, 102 S.Ct. 1010 (1982); *McInerney v. Berman*, 621 F.2d 20, 23-24 (1st Cir. 1980).

considered the strength of the prosecution's evidence in determining whether an instructional error was harmless where that error has involved *Sandstrom*'s burden-shifting prohibition. These are instances where the presumption has either been expressly stated to be rebuttable[35] or where it has been clear from the instructions themselves that both "presumptions" and "inferences" were described as factual deductive devices for the jury to use in its discretion.[36]

Cases involving instructions that have been stated in language paralleling the instruction in *Sandstrom* or that could be construed as promoting a similar ambiguous interpretation have been held harmless in some cases where an affirmative theory of defense such as "alibi" or "non-involvement" have been interposed. In these circumstances, some reviewing courts have been able to ascertain with certainty either that the instruction was inapposite or that the intent of the defendant was unnecessary for the jury to consider.[37] Similar results have been reached where the

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[35]*E.g. State v. McKenzie*, 608 P.2d 428, 257 (Mont. 1980), *cert. denied* 449 U.S. 1050 (1980) (presumptions expressly stated to be rebuttable); *People v. Wright*, 408 Mich. 1, 289 N.W.2d 1, 6 (1980) (presumption interpreted as burden-shifting). *Cf. Hosch v. State*, 246 Ga. 417, 271 S.E.2d 817, 819-20 (1980) (harm caused when one presumption was described as rebuttable and no similar cautionary language used in the description of a second presumption).

[36]*E.g. Nelson v. Scully*, No. 81-2208, slip. op. at 1051, 1053-54 (2d Cir. January 28, 1982). *See also United States v. Bohlmann*, 625 F.2d 751, 752-53 (6th Cir. 1980).

[37]*E.g. United States v. Winter*, 663 F.2d 1120, 1144-45 (1st Cir. 1981) (defense was non-involvement in conspiracy); *McGuinn v. Crist*, 657 F.2d 1107, 1108-09 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3695 (1982) (only disputed issue was alibi); *United States v. Reeves*, 594 F.2d 536, 541 (6th Cir. 1979) (sole issue for the jury was identification). *But cf. Burton v. Bergman*, 649 F.2d 428 (6th Cir. 1981) (*Sandstrom*-type instruction not harmless in assault with intent to

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instruction at issue pertained only to an offense for which the defendant was not convicted.[38] Even in this situation, however, courts have been concerned with possible "spill-over" effects.[39]

No court has held an instructional error like that in *Gypsum* to be harmless. The few post-*Sandstrom* cases that have considered this issue have either stated or intimated that such error is reversible per se.[40]

The appropriate guide for determining whether the instructional error at issue affected the jury's verdict is the language of the instruction itself. The instruction in the instant case carried the prosecution's burden on the essential element of intent. Petitioner's argument that no contrary evidence was produced is hardly apposite under the cir-

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*(footnote continued from preceding page)*

murder prosecution where the defendant's intent was an issue); *Tyler v. Phelps*, 643 F.2d 1095, 1099 (5th Cir. 1981) (*Sandstrom*-type instruction not harmless in murder prosecution where the primary issue was the defendant's specific intent to kill); *Dietz v. Solem*, 640 F.2d 126, 128, 131 (8th Cir. 1981) (burden-shifting presumption of intent not harmless where the state was required to prove a specific intent to commit burglary even though the principal issue at the trial was whether the defendant could be circumstantially placed at the scene) *Hammontree v. Phelps*, 605 F.2d 1371 , 1378-80 (5th Cir. 1979) (instruction that shifted burden to disprove criminal negligence to the defendant, upon proof by the state of violations of speeding and driving while intoxicated statutes, was not harmless even though defendant produced no evidence to rebut the state's proof of the speed of his vehicle. *See State v. Hammontree*, 363 So.2d 1364, 1366, 1372-73 (La. 1978).

[38]*State v. Sheldon*, 301 N.W.2d 604, 611-613 (N.D. 1980).

[39]*Washington v. Harris*, 650 F.2d 447, 452-54 (2d Cir. 1981) (habeas corpus petition dismissed without prejudice for determination by state courts of possible "spillover" effect on murder conviction of *Sandstrom*-type instructions on lesser crimes).

[40]*People v. Hedrick*, 105 Cal. App. 3d 166, 172, 164 Cal. Rptr. 169, 172 (1980); *People v. Burres*, 101 Cal. App. 3d 341, 353, 161 Cal. Rptr. 593, 599 (1980).

cumstances. By its own terms, the trial court's conclusive presumption would have required the same result regardless of the quantum of evidence produced.[41] To be sure, as Petitioner emphasizes, Petitioner's Brief at 35, the jury was told to base its verdicts on the evidence alone. (J.A. 14A, 46A-47A). But the conclusive presumption was never explained to the jury as an evidentiary device. It was described as a rule of law. (J.A. 23A, 25A).

Moreover, if instructions are to be considered as a coherent whole—as *Cupp v. Naughten*, *supra*, 414 U.S. at 146-47, and *Boyd v. United States*, *supra*, 271 U.S. at 107, command—the question is whether the jury was properly instructed on the State's burden to prove guilt beyond a reasonable doubt. In *Sandstrom*, *supra*, 442 U.S. at 519 n. 7, this Court emphasized that, if the jury interpreted the instruction as a conclusive presumption, it could have considered that presumption as a means whereby proof of intent beyond a reasonable doubt was mechanically accomplished. And, as this Court stated in *Jackson v. Virginia*,

> Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error. See *Cool v. United States*, 409 U.S. 100. Cf. *Taylor v. Kentucky*, 436 U.S. 478. Thus, a defendant whose guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence.

443 U.S. at 320 n. 14.[42]

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[41] *See McInerney v. Berman*, *supra*, 621 F.2d at 23 ("An instruction from the judge that proof of one fact is irrebuttable proof of a presumed fact is conclusive.")

[42] *See People v. Burres*, *supra*, 101 Cal. App. 3d at 354 (holding a seemingly conclusive presumption of intent to be reversible error per se on the basis of *Jackson*).

As the opinion of the Supreme Court of Connecticut below makes clear, the two convictions reversed were specific intent crimes. (J.A. 67A). The trial court's charge stressed that Respondent's state of mind, with respect to intent, was at issue. (J.A. 23A). The erroneous instruction informed the jury that, upon finding that Respondent committed the acts testified to by the complainant and upon determining the natural and necessary consequences of those acts, it was obliged to find the requisite intent.

The jury instructions in this case thus not only "had the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of [the defendant's] state of mind," *Sandstrom*, *supra*, 442 U.S. at 521, but did so by a conclusive presumption of intent—the most egregious possible means of achieving that affect. This Court has consistently denounced conclusive presumptions of intent as being wholly irreconcilable with the fundamental requirements of fairness and due process in our criminal justice system. It reasoned in *Morissette* that such a presumption conflicts "with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." 342 U.S. at 275. It explained in *Gypsum* that such a presumption invades the "factfinding function" of the jury. 438 U.S. at 446. And it reiterated in *Sandstrom* that such a presumption deprives a defendant "of his constitutional rights as explicated in *Winship*." 442 U.S. at 523.

It is our position that "the overriding presumption of innocence" and the right to have each element of the crime at issue be determined by a jury are "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *Chapman v. California*, *supra*, 386 U.S. at 23. The harm that such an infraction necessarily involves

is particularly severe when the trial court has ordered the jury to conclusively presume a basic element of the crime. Such an instruction strikes a blow to the heart of the jury system itself.

A conclusive presumption of intent is, in fact, indistinguishable from a directed verdict of guilty on that element of the offense. *See* Allen, *Structuring Jury Decisionmaking In Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 Harv. L. Rev. 321, 355-56 & n. 138 (1980).[43] It is a hallmark of our legal system—and one of the principal distinctions between civil and criminal trials—that a court has no power to direct a verdict of guilty, "regardless of how overwhelmingly the evidence may point in that direction," *United States v. Martin Linen Supply Co.*, *supra*, 430 U.S. at 573 (1977). *Accord United Brotherhood of Carpenters v. United States*, *supra*, 330 U.S. at 408; *Sparf v. United States*, 156 U.S. 51, 105-06 (1895). This rule is supported by "a deep undercurrent of reasons," *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969), involving the fundamental right to trial by jury. It could hardly "be maintained that an accused person has had a trial by an impartial jury, within the meaning of the constitution, in a case where the court has directed the jury, without deliberation, to find him guilty," *United States v. Taylor*, 11 F. 470, 471 (D. Kan. 1882). It has been un-

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[43]It is worth noting that Petitioner's citation of Professor Allen's article and Nesson, *Rationality, Presumptions and Judicial Comment: A Response to Professor Allen*, 94 Harv. L. Rev. 1574 (1981), for the proposition that "some 'presumption' instructions may be viewed as 'functionally indistinguishable' from judicial comment on the evidence," Brief of Petitioner at 30 n. 17, is strikingly inapposite to the instant case. The portions of these articles cited by Petitioner are expressly concerned with *non-mandatory* presumptions. *See* Allen, *supra*, at 335; Nesson, *supra* at 1584.

questioned since the seventeenth century that, "[I]f the judge's opinion must rule the matter of fact [in determining guilt] the trial by jury would be useless." 2 M. Hale, *The History Of The Pleas Of The Crown* 313 (Wilson ed. 1778). *See Bushell's Case*, 124 Eng. Rep. 1006, 1010 (C.P. 1670).

The fact that it is for juries and not judges to decide guilt—no matter how overwhelming the evidence—has thus been ingrained in the right to trial by jury throughout our national experience. "The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation." *Walz v. Tax Commission*, 397 U.S. 664, 681 (1971). There being no functional difference between a directed verdict of guilt on an element of a crime and a conclusive presumption that that element exists, the teachings of *Sandstrom* find ample justification in this consideration alone.

The rule that a judge may not direct a verdict of guilty regardless of the evidence that has been adduced has important consequences for appellate tribunals as well as trial judges. If the trial court had ordered the jury to find Lindsay Johnson guilty as charged at the close of testimony, it would be unthinkable to let such a directed verdict stand, no matter how overwhelming the evidence. An affirmance of such an order would, to put it mildly, revolutionize our system of criminal justice. But if the trial court has instead directed the jury to find a crucial element of the crime, an appellate court reviewing that instruction is in a functionally identical posture. It can read the cold record and may be utterly convinced that the presumed element does, in fact, exist. But it is not the jury. It cannot see by the jury's eye nor hear by the jury's ear. It cannot, under our system of justice, infer the thing to be resolved by the *jury's* understanding and reasoning.

This case ultimately involves the nature of the truth-

finding process. As this Court observed in its most recent decision on jury decisionmaking,

> "The basic purpose of a trial is determination of truth," *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966), and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself.

*Brown v. Louisiana*, 447 U.S. 323, 334 (1980) (plurality opinion). A conclusive presumption of intent not only violates the rule of *Sandstrom v. Montana* but poses an obvious, lethal threat to the jury's ability to perform its truth-seeking function. We have juries precisely to determine whether things like intent exist. Neither trial judges nor appellate tribunals can constitutionally replace them against the defendant's will. As long as the historic independence and ultimate responsibility of the jury remain "fundamental to the American scheme of justice," *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), instructions directing the jury to find intent can never be considered harmless when intent is an issue in the case.

## V. THE *SANDSTROM* ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT ON THE FACTS OF THIS CASE

It is clear from the record that intent was an issue very much in dispute in the instant case and that a finding of intent was far from a foregone conclusion. While the complainant's testimony unquestionably described a sordid and brutal

series of actions on the part of the Respondent, some of the complainant's own actions—for instance her unexplained driving of the car after it had become stuck in a snowbank (R.T. 295-297, 299-307)—were so enigmatic that a jury would not necessarily have been disposed to mechanically accept every detail of her testimony. But even if the accuracy of her testimony is assumed, the events that she described were themselves sufficiently ambiguous to cast doubt on whether Respondent had the requisite specific intent to commit the substantive crimes in question.

This is particularly true with respect to the attempted murder charge. The fact that Respondent told the complainant that she would be left with a dime near a telephone booth, the fact that the incident on the bridge could be construed as spontaneous, the fact that the bridge was in a somewhat populated area, the fact that the record fails to indicate the height of the bridge or the depth of the stream, and the fact that the complainant heard voices asking "Have you seen her?" and "Is she over there?" (R.T. 89) all becloud the inquiry as to whether the requisite intent to kill existed. The assailants' apparent search for the complainant is a good example of this ambiguity. They may have been searching for the complainant because they had suddenly realized what they had done and wished to rescue her, or they may have been searching for her in order to finish her off.[44]

While a court reviewing this record may have an opinion as to whether the requisite intent to kill existed, and while that opinion may be a very strong one, this fact simply cannot be ascertained with certainty on the basis of the record. *See*

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[44]We do not know how opposing counsel addressed these facts in summation. Arguments of counsel are not recorded in Connecticut, *see* Conn. Gen. Stat. §51-61, although exceptions are occasionally made by trial judges. No arguments were recorded in this case. *See* J.A. 12A.

*Burton v. Bergman*, 649 F.2d 428, 432 (6th Cir. 1981). The decision of questions like this has been the historic function of the jury. The trial court's instructions in the instant case not only deprived Respondent of a jury decision—and therefore a jury trial—on this question, but may well have tipped the scales of justice in fact. Even in view of the State's evidence, the trial court's conceded error was certainly not harmless beyond a reasonable doubt. On this record, the decision of the Supreme Court of Connecticut was compelled by *Chapman v. California*.

## CONCLUSION

The judgment of the Supreme Court of Connecticut should be affirmed.

Respectfully submitted,

JERROLD H. BARNETT
Public Defender
JON C. BLUE
Assistant Public Defender

# Docket Sheet

| NO. 81-927-CSY | TITLE Connecticut, Petitioner |
|---|---|
| VIDE: 81-5560 | v. Lindsay B. Johnson |

| DOCKETED | COURT |
|---|---|
| Nov. 16, 1981 | Supreme Court of Connecticut |

| DATE | PROCEEDINGS AND ORDERS |
|---|---|
| | Counsel for Petitioner: Linda K. Lager |
| | Counsel for Respondent: Jerrold H. Barnett, |
| Nov. 16, 1981 | Petition for writ of certiorari filed. (Record filed). |
| Dec. 14, 1981 | Motion for respondent for leave to proceed in forma pauperis, and brief in opposition filed. |
| Dec. 16, 1981 | DISTRIBUTED. 1-8. |
| Feb. 8, 1982 | REDISTRIBUTED. 2-19. |
| Feb. 22, 1982 | The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED. |
| | --- |
| Apr. 12, 1982 | Joint appendix filed. |
| Apr. 21, 1982 | Brief for the petitioner filed. |
| May 27, 1982 | Brief for the respondent filed. |
| Aug. 5, 1982 | CIRCULATED. |
| Oct. 13, 1982 | ARGUED. |